

Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions

KEVIN BROWN* AND JEANNINE BELL**

The Negro race, like all races, is going to be saved by its exceptional men. The problem of education, then, among Negroes must first of all deal with the Talented Tenth; it is the problem of developing the Best of this race that they may guide the Mass away from the contamination and death of the Worst, in their own and other races.¹

INTRODUCTION

Selective colleges, universities, and graduate programs first created affirmative action admissions policies in the late 1960s and early 1970s. At that time, due to the historical impact of racism on American society, the “one-drop rule” classified any person with some African ancestry as black.

* Professor of Law, Harry T. Ice Faculty Fellow of Indiana University School of Law—Bloomington, and Emeritus Director of the Hudson and Holland Scholars Program at Indiana University—Bloomington. B.S., 1978, Indiana University; J.D., 1982, Yale University. This author would like to provide special thanks to the members of the faculty of the Washington University School of Law in St. Louis, Missouri, who heard and commented on an earlier draft of this article; conference participants at the symposium entitled “The School Desegregation Cases and the Uncertain Future of Racial Equality” at The Ohio State University Moritz College of Law on February 21, 2008; conference participants at the symposium entitled “The Future of Affirmative Action: Seattle No. 1, Race, Education and the Constitution” at the University of Miami School of Law on February 1, 2008 and conference participants at the symposium entitled “Immigration Law & Public Policy” at the Texas Southern University Thurgood Marshall School of Law. I would also like to thank several people from whose discussions this Article has benefited: Marvin Jones, John Powell, Vincene Verdun, Susan Williams, Don Gjerdingen, Ken Dau-Schmidt, Feisal Amin Istrabadi, Kent Syverud, Kimberly Jade Norwood, Crystal Brown, Charles Lawrence, Eboni Nelson, Danielle Holly-Walker, and Reginald Robinson. Special thanks to Stephen Reynolds, Dominique McGee, James Lowry, and Patrick Day for their research assistance.

** Professor of Law and Charles L. Whistler Faculty Fellow, Indiana University School of Law—Bloomington. A.B., 1991, Harvard College; J.D., 1999, Ph.D. (Political Science) 2000, University of Michigan. Special thanks to Angela Onwuachi-Willig and John Skrentny for their thoughtful feedback. Thanks as well to Simon Pei, Obiechina Chinedu Ene, Jessica Zorn, and Adeline Ruiz Baez for their very helpful research assistance.

¹ W.E.B. DU BOIS, *The Talented Tenth*, in A W.E.B. DU BOIS READER 31, 31 (Andrew Paschal ed., 1971).

The predominance of the one-drop rule meant that children born from black and white parents were brought up to consider themselves black. In addition, a very small percentage of blacks of college age—and thus potential beneficiaries of these admission policies—had a foreign-born black parent. As a result, at this time the general rule about the overwhelming majority of blacks who were of college age was that they were descendants of blacks originally brought to the United States as chattel slaves. This was a fundamental assumption upon which affirmative action was developed.

Supporters and critics hailed *Grutter v. Bollinger*,² the Supreme Court's most recent higher education affirmative action decision, as a victory for affirmative action. By solidifying support for affirmative action, both supporters and critics must have envisioned the maintenance of an established presence of blacks whose racial and ethnic ancestry was deemed as predominantly traceable to the historical oppression of blacks in the United States—at least for the next twenty-five years. Yet, despite the Supreme Court having upheld university affirmative action admissions plans, right now we are witnessing a historic change in the racial and ethnic ancestry of blacks who are the beneficiaries of affirmative action. Selective colleges, universities, and graduate programs are admitting increasing percentages of blacks with a white parent and foreign-born black immigrants and their sons and daughters. In light of this dynamic, a change is occurring in the once-general rule regarding the racial and ethnic ancestry of blacks on affirmative action throughout the country. As a result, blacks whose predominate ancestry is traceable to the historical oppression of blacks in the United States are likely more underrepresented in affirmative action than most administrators, admissions committees, or faculties may realize.³

² 539 U.S. 306 (2003).

³ The implications of our discussion may also reverberate beyond just admissions policies. Many colleges and universities also have race-conscious scholarship programs with limited resources that are used to attract the best underrepresented minorities to their college campuses. Often these race-conscious scholarship programs will base their selection process on the same objective academic measures. For four years, Professor Kevin Brown was the Director of the Hudson & Holland Scholars Program (HHSP) at Indiana University-Bloomington. HHSP is a minority scholarship program. "The mission of the Hudson & Holland Scholars Program (HHSP) is to recruit, retain, and prepare students with outstanding records of academic achievement, strong leadership experience, and a commitment to social justice. . . . The Hudson & Holland Scholars Program serves as an integral vein of Indiana University's efforts to foster benefits of educational diversity by assuring the obtaining of a critical mass of students from underrepresented minority backgrounds with a history of discrimination." Indiana Hudson & Holland Scholars Program, <http://www.indiana.edu/~hhsp/> (last visited Nov. 19, 2008). As of the fall of 2008 there are approximately 570 students spread through the four undergraduate years on HHSP. HHSP has approximately 25% of the black and one-third of the Latino undergraduate students on the Bloomington campus. As the Director

This Article will question the process that lumps all blacks into a single-category approach that pervades admissions decisions of so many selective colleges, universities, and graduate programs. In directing attention to the changing racial and ethnic ancestry of blacks on college campuses, we describe the significant increase in the percentage of blacks with a white parent and foreign-born black immigrants and their sons and daughters on college campuses. As authors, we are mindful of the long and odious history in the United States of classifications based on ancestry. We are cognizant that discussions about the underrepresentation on affirmative action programs of particular blacks as determined by their parentage within the "black" category cannot help but dredge up negative feelings from this infamous past. Beyond generating negative feelings, the phenomenon we are describing is counterhistorical. Historically, the black experience is the treatment of black individuals as members of one race. This treatment produced a cultural orientation for blacks in the United States centered on the fundamental belief in a unified black population. Discussions about the racial/ethnic parentage of blacks require the recognition and open discussion of the existence of various "black" racial and ethnic groups. As a result, such discussions call into question black unity, which is the historical core belief of the black community. Nevertheless, we proceed, mindful of the reality that not discussing the growing percentage of blacks with a white parent and foreign-born black immigrants and their sons and daughters among blacks on affirmative action is a choice. It means that blacks whose predominate racial and ethnic heritage is traceable to the historical oppression of blacks in the U.S. are far more underrepresented than administrators, admissions committees, and faculties realize. As a result, they are far less likely in the future to qualify for the positions of social advantage awarded to those who obtain selective academic credentials based on them. In this situation, our silence would constitute our assent to these developments.

An overarching vision of the goals of affirmative action—at least as it applies to the black community in the United States—is required in order to express concern about the growing underrepresentation on affirmative action of blacks whose predominate ancestry is traceable to the historical oppression in the United States. In this Article, we approach affirmative action from the perspective of the historical struggle undertaken by the black community to overcome its racial oppression in the United States. Affirmative action is, therefore, a part of the strategy for the uplift of the

of this Program, Professor Brown reviewed over 1,600 applications from underrepresented minorities throughout the U.S. It is from this experience of reviewing these applications and making the selections for these students that he first became aware of the growing percentages of blacks with a white parent and foreign-born black immigrants and their sons and daughters among blacks on selective higher education programs.

black community in the United States. W.E.B. Du Bois, the legendary African-American social commentator, articulated this concept over a hundred years ago in his famous article *The Talented Tenth*.⁴ Du Bois's view squarely places part of the responsibility for black empowerment gained through college and university attendance on the shoulders of the Talented Tenth. The Talented Tenth are the well-educated, distinguished men and women crusaders dedicated to alleviating the burdens of blackness and the color line. According to Du Bois, members of the Talented Tenth are obligated to sacrifice their personal interests in an effort to provide leadership to improve the social, economic, and political conditions of the black community.

This Article is organized in the following manner: after clarifying the different groups of individuals who comprise the black population on college and university campuses, Part One of the Article explores the purposes of affirmative action, focusing particularly on the policy's theoretical and historical roots as a remedy for historical discrimination in the United States. In this vein, we argue that affirmative action is intended to assist in the attenuation of the historical effects of racial subordination of African Americans in the United States. This part also demonstrates that classifying blacks based on their racial/ethnic ancestry, with a focus on attenuating the effects of racial subordination in the United States, is consistent with the Supreme Court's opinion in *Grutter*. Part Two focuses on the increasing percentage of blacks with a white parent and foreign-born black immigrants and their sons and daughters attending colleges, universities, and graduate programs, including the selective ones. Part Three discusses the implications of these demographic changes for the historical struggle against racial oppression in the United States. Part Four proposes a solution for administrators, admissions committees, and faculties of selective colleges, universities, and graduate programs.

I. AFFIRMATIVE ACTION AS A PRODUCT OF THE HISTORICAL STRUGGLE OF THE BLACK COMMUNITY IS CONSISTENT WITH THE COURT'S OPINION IN *GRUTTER*

Our goal in this Article is to unpack some of the numerous differences that are likely to exist among black applicants with different racial and ethnic backgrounds for purposes of positive considerations in the admissions process of selective colleges, universities, and graduate programs. Since this requires discussing blacks in the United States with conscious reference to their ancestry, terminology is a difficult aspect of this Article that we must clarify as soon as possible. This Part first clarifies that terminology. Then it

⁴ DU BOIS, *supra* note 1, at 36.

discusses affirmative action from the perspective of the historical struggle undertaken by the black community to overcome its racial oppression in the United States. This Part concludes with a discussion of the Supreme Court's opinion in *Grutter* to demonstrate that a concern about the underrepresentation of "Ascendants" on affirmative action is consistent with the Court's opinion.

A. Clarifying the Meaning of Terminology: "Black/White Biracials," "Black Immigrants," and "Ascendants"

Most, if not all, college and university affirmative action programs lump all individuals of African descent under one "African American/African/black" category.⁵ In reality, college and university applicants who check this "black" box may have distinctly different racial or ethnic heritages. In order to discuss this, we have created terms to differentiate large groups of individuals of African descent. However, we use the terms "Negroes," "Coloreds," "African Americans," and "black" in the historical and inclusive sense of referring to people in the United States who are of African descendant.⁶

We use the term "Black/White Biracials" to designate individuals born after June 12, 1967⁷—the date of the Supreme Court's opinion in *Loving v.*

⁵ Both the Common Application and the Universal College Application lump all blacks into one "African American/African/black Category." The Common Application for Undergraduate College Admission (2008), available at <https://www.commonapp.org/CommonApp/docs/downloadforms/CommonApp2008.pdf>; Universal College Application (2008), available at https://www.universalcollegeapp.com/Library/PrintPreview/Universal_College_Application.pdf. Almost 350 public and private colleges accept Common Application for the applications for academic year 2009/10. Almost 80 public and private colleges accept the Universal College Application. For a list of the 346 institutions that accept the Common Application, see Common Application—List of Members (2008), available at <http://www.commonapp.org/CommonApp/Members.aspx>. For a list of the institutions using the Universal College Application, see Universal College Application—College Membership, available at <http://www.universalcollegeapp.com/index.cfm?ACT=Display&APP=APPONLINE&DSP=CollegeMembership> (last visited Nov. 19, 2008).

⁶ It important to note that we will also be citing to various statistical reports and documents throughout this Article. They employ different terminology for blacks. When we do so, we will use the terms that were used in those reports and documents.

⁷ We use June 12, 1967 as a somewhat arbitrary date. We do not believe that there is any particular magic in using 1967 as our date. (For a discussion on this, see RAINIER SPENCER, CHALLENGING MULTIRACIAL IDENTITY 63–82 (2006).) However, we see it as a convenient date for determining which blacks with one white parent will be considered an Ascendant as opposed to a Black/White Biracial because it occurs around the time that selective higher education programs initiated affirmative action programs. Since our

Virginia⁸—who have one parent that is black (any person with a significant amount of black ancestry) and one that is white.⁹ We consider the parents of these individuals black if they have a significant amount of African heritage. This is due to the disdain for interracial marriage, the utilization of the “one-drop rule” in American society, including on the Census forms since 1930,¹⁰ to determine which individuals would be considered as black, and the classification of mixed-race blacks as “black” for much of the twentieth century.

We use the term “Black Immigrants” to refer both to blacks who entered the United States after July 1, 1968—the effective date of the Immigration

focus is actually on individuals treated as “black” for present purposes of affirmative action at selective colleges or universities, however, it only applies to individuals who are currently pursuing their higher education objectives. Thus, this definition would exclude from the definition of Ascendants those black individuals with a white parent born after June 12, 1967. Since blacks with one white parent must be born before June 12, 1967 in order to fit within the definition of Ascendants, then these individuals would at least be forty-one years old if they are admitted in the Fall of 2009. See the discussion surrounding resistance to interracial marriages and mixed race individuals, *infra* notes 117–175.

⁸ 388 U.S. 1 (1967) (striking down antimiscegenation statutes).

⁹ We recognize that we have included those blacks who have one parent that is Asian, Latino, or Native American within our definition of Ascendants. This is true even though one study showed that Black/Asians are less likely to self-identify as black than Black/White Biracials. Melissa Herman, *Forced to Choose: Some Determinants of Racial Identification in Multiracial Adolescents*, 75 CHILD DEV. 730, 736 tbl. 2 (2004), available at <http://www.dartmouth.edu/~soc/pdf/MHftc.pdf>. There were approximately 6.8 million Americans, or about 2.4% of the population, who described themselves as multiracial on the 2000 Census. CENSUSSCOPE, UNITED STATES MULTIRACIAL PROFILE (2001), http://www.censuscope.org/us/print_chart_multi.html. Ninety-three percent of those who checked multiple racial/ethnic categories checked only two such boxes. *Id.* There were 784,764 reported black/white individuals. *Id.* There were 706,525 other blacks who checked one other racial box (black and some other race 417,249; black and American Indian 182,494; black and Asian 106,782). *Id.* Thus, black/white individuals constituted 52.6% of blacks who checked black and one other box on the 2000 Census.

Our solution to the underrepresentation of Ascendants is to revise the admissions forms used by colleges, universities, and graduate programs. These revisions will allow admissions committees to determine the exact parentage of descendants of Africa. Each higher educational program could decide whether to include or exclude these blacks from the additional positive considerations in the admissions process reserved for Ascendants. We believe that such a decision should depend upon the local conditions and history of the particular educational program.

¹⁰ The instructions for the 1960 Census continued the 1930 change, which required the Census form of “[a] person of mixed White and Negro blood was to be returned as Negro, no matter how small the percentage of Negro blood.” C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. SOC. 563, 568 (2003).

Act of 1965¹¹—and to blacks who have at least one foreign-born black parent.¹² In 1960, foreign-born blacks in the United States were less than 1% of the black population, totaling just 125,000 individuals.¹³ Thus, before the change in American immigration policy and the independence of many Caribbean nations, the percentage of foreign-born blacks was so small that American society did not distinguish between them and native blacks.¹⁴ We recognize that there may be important cultural differences between foreign-born blacks and second-generation Black Immigrants who were born in the United States. However, like Black/White Biracials, second-generation blacks would also have at least as much heritage derived from a parent whose ancestry was not a product of the racial situation in the United States as a parent whose ancestry was a part of that heritage. This is not to deny the negative impact of racism originating with the transatlantic slave trade on the

¹¹ Immigration and Nationality Act of 1965, 1965, H.R. 2580 89th Cong. (1965) (codified as amended in scattered sections of 8 U.S.C. 1151).

¹² The issue of the treatment of blacks from the United States territory of the United States Virgin Islands requires additional discussion. Individuals from the United States Virgin Islands represent a unique case. The islands were named by Christopher Columbus on his second voyage in 1493. For the next 300 years they were controlled by various European powers, including Spain, Britain, the Netherlands, France, and Denmark-Norway. The islands came under Danish control in 1754. Slave labor was used to produce sugar cane until the abolition of slavery in 1848. With the onset of World War I, the United States feared that the island might be seized by Germany and used as a submarine base. The United States purchased the islands in a deal that was finalized in January 1917. United States citizenship was granted to the inhabitants of the islands in 1927. As a result, we would classify members of the Virgin Islands as Ascendants, not black immigrants.

¹³ CAMPBELL GIBSON & EMILY LENNON, RACE AND HISPANIC ORIGIN OF THE POPULATION OF NATIVITY: 1850 TO 1990 (1999), available at <http://www.census.gov/population/www/documentation/twps0029/tab08.html>. This rise in immigration to the United States was triggered by the independence of Caribbean countries and the passage of the Hart-Cellar Act in 1965, which abolished the country of origin quotas, affirmed family connection preference, and increased the total numbers of immigrants to be admitted to the United States. Roger Waldinger, *Immigration and Urban Change*, 15 ANN. REV. OF SOC. 211, 212 (1989).

¹⁴ We do not believe that there is any particular magic in using July 1, 1968—the effective date of the Immigration Act of 1965—as our date. We see it as a convenient date for this discussion because it occurs around the time that selective higher education programs initiated affirmative action programs. Since our focus is on individuals treated as “black” for present purposes of affirmative action at selective colleges, universities, and graduate programs, however, it only applies to individuals who are currently pursuing their higher education objectives. Thus, this definition would exclude from the definition of black immigrants those foreign-born blacks who entered the United States before July 1, 1968. If these individuals are applying for admission for the fall of 2009, they would be at least forty years of old.

lives of parents of second-generation Black Immigrants. From the perspective of the struggle of blacks in the United States to overcome the historical racism here, however, the descendants of those blacks who suffered from racism in this country should receive priority. After all, their parents did not choose to come to the United States.

We use the term "Ascendants"¹⁵ to identify the remaining blacks. We call these individuals "Ascendants" in order to make the link between their ancestry and that of blacks' ascendancy out of chattel slavery and segregation. Their ascendancy out of these oppressive institutions created the changed conditions in American society that has made possible both increasing black/white sexual unions and immigration of foreign-born blacks to the United States. The definition of Ascendants includes blacks who are at least forty-one years old with a white parent and foreign-born blacks who immigrated to the United States at least forty years ago. In practical terms there are very few forty-one years old Black/White Biracial blacks, or foreign-born black immigrants who have been in the U.S. for over 40 years who are seeking admission to selective higher education programs. The general goal of defining blacks as "Ascendants" is to limit the term "Ascendants" to either those who personally experienced America's racially discriminatory history their entire lives or were born from parents who were generally considered black at the time that affirmative action policies were first adopted. This definition of Ascendants is a product of our view of analyzing affirmative action from its inception from the perspective of the historical struggle undertaken by the black community to overcome its racial oppression in the United States.

¹⁵ We use the term "Ascendant" because it is a more positive connotation that respects the overcoming aspects of blacks who ascended from America's legacy of slavery and segregation. The term "Ascendants" is also used by African Americans who recently left America to repatriate in the Republic of Ghana to describe themselves. This term was first mentioned to Professor Brown in the summer of 2007 by Seestah Imaakus and Brother El Shabazz, the owners and operators of Hotel One Africa located in the city of Cape Coast, Ghana. One Africa is a facility located between Cape Coast Castle (the main British administrative castle during the transatlantic slave trade) and Elmina Castle (the first permanent European structure built in Africa) on the Ghanaian coast. Their lifelong mission is to assist blacks of the Diaspora as they come through the experience of going through those castles. We also wish to specifically acknowledge the insightful article written by Angela Onwuachi-Willig. See Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141 (2007). She, Professor Derrick Bell of New York University School of Law and others use the terms "descendants" and "legacy Blacks" to denote these blacks to make the connection between their ancestral lineage as descended from blacks who were enslaved and segregated. *Id.* at 1149 n.27.

B. Affirmative Action from the Perspective of the Historical Struggle Undertaken by the Black Community to Overcome Its Racial Oppression in the United States

The legal systems in North America legally classified blacks first as non-citizens and then as second-class citizens for 300 years before the Supreme Court's decision in *Brown v. Board of Education*.¹⁶ The salient feature of the black experience to that time in the United States was that in some way they were perceived as "less than" the applicable norm. Up until the twentieth century, this belief was rooted in immutable distinctions, first based on an interpretation of the Divine Will of God and later on white scholars' interpretation of the defective biology of a race of people having developed in the inhospitable climate of Africa.¹⁷

Prior to the 1950s, the belief in the genetic inferiority of blacks justified legally restricting the rights of blacks. Scientific racism made the oppression of blacks in the form of slavery, and, after the Civil War, segregation and Jim Crow, appear as rational responses to the natural order of things.¹⁸ For example, the most authoritative legal opinion on the constitutional view of blacks and their rights during the antebellum period was Chief Justice Taney's 1857 opinion in *Dred Scott v. Sandford*.¹⁹ In concluding that slave and would-be freedman Dred Scott could not sue in federal court to obtain his freedom, Chief Justice Taney found that people of African descent (slave or free) were not considered citizens within the definition of the Constitution.²⁰ As a result, the federal courts were closed to them. In interpreting the understanding of the Founders of the country with regard to blacks, Taney wrote:

[Blacks] had for more than a century before [the Declaration of Independence] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect²¹

¹⁶ 347 U.S. 483 (1954).

¹⁷ See KEVIN BROWN, *RACE, LAW & EDUCATION IN THE POST DESEGREGATION ERA* 41–72 (2005).

¹⁸ *Id.* at 60–72.

¹⁹ 60 U.S. 393 (1857).

²⁰ *Id.* at 406.

²¹ *Id.* at 407.

Taney emphasized later in the opinion that blacks had been stigmatized with "deep and enduring marks of inferiority and degradation."²²

The Supreme Court's highlighting of black inferiority continued in the Court's 1896 opinion in *Plessy v. Ferguson*,²³ the preeminent case of the segregation era. In *Plessy*, the Court addressed an equal protection challenge to a statute requiring "separate but equal" accommodations on a railroad passenger car. Justice Brown's opinion for the Court stated that "in the nature of things [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality."²⁴ Justice Brown later noted, "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."²⁵ Thus, from this constitutional standpoint, segregation was justified based on the notion that blacks were socially inferior to whites.

Against a background of racial domination in the United States, the descendants of the sons and daughters of the soil of Africa formulated a counter-discourse to how they were normally treated and understood within mainstream American society. This counter-discourse provided an alternative explanation for the role and condition of blacks in American society. African Americans developed a perspective on their treatment that substituted the notion of oppression for inferiority.²⁶ This perspective generated one principal goal, objective, and pursuit: the liberation of black people from racial oppression.²⁷ The uniqueness of the African-American culture is the

²² *Id.* at 416.

²³ 163 U.S. 537 (1896).

²⁴ *Id.* at 544.

²⁵ *Id.* at 552.

²⁶ For a discussion of this perspective see BROWN, *supra* note 17, at 73–101. We distinguish our view of the struggle of African Americans against racial oppression from those who view the black perspective as one of victimology. See, e.g., JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* (2000). When we discuss the liberation perspective, it is not as an embrace of victimhood. Rather, it is a desire to eradicate the victimization that is a result of historical racial oppression. As such, it is derived from a perspective that takes the struggle against racial oppression, not the effect of that oppression as its primary feature.

²⁷ We also reject the interpretation of Du Bois's double consciousness given by scholars like Reginald Robinson. See, e.g., Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. THIRD WORLD L.J. 231, 240–59 (2000) (asserting that the double consciousness reveals itself in two ways: first, "white America [imprinted] blacks with a deep sense of inferiority," and second, "while thinking of themselves as Americans, blacks simultaneously accepted that they are indeed less than whites"). While we agree with his first aspect of the double consciousness—that America attempted to

distinctiveness resulting from a culture forged by an experience and history of racial oppression in the United States by a people dedicated to liberation of the race.

Viewing affirmative action from the perspective concerned with racial progress in the United States, which individuals of African descent selective colleges, universities, and graduate programs admit is a matter of extreme importance. The reach of admissions decisions extend far beyond the classroom, touching on the boardroom, the corner office, the faculty lounge, the pressroom, the courthouse, and the statehouse.²⁸ Such decisions influence the training of leaders for public life for all Americans. Individuals admitted as students to selective higher education programs tend to become the people who shape business, politics, education, the arts, media, and the law for the next generation.

We use the legendary African-American social commentator W.E.B. Du Bois's famous article, *The Talented Tenth*²⁹ to describe how affirmative action is a part of the strategy for the uplift of the black community. In *The Talented Tenth*, published in 1903, Du Bois creates a blueprint for the uplift of the black community. Du Bois maintains that college and university attendance is central to the success of the black community. He writes, "How then shall the leaders of a struggling people be trained and the hands of the risen few be strengthened? There can be but one answer: The best and most capable of their youth must be schooled in the colleges and universities of the land."³⁰

Du Bois places part of the responsibility for black empowerment squarely on the shoulders of the Talented Tenth—well-educated, distinguished men and women crusaders dedicated to alleviating the burdens of blackness and the color line. According to Du Bois, members of the Talented Tenth were obligated to sacrifice their personal interests in an effort to provide leadership to improve the social, educational, economic, and political condition of the black community.³¹ Du Bois writes:

imprint blacks with a deep sense of inferiority—we see the second aspect of the double consciousness as the collective struggle against racial oppression. For us, the second aspect of the double consciousness represents the real African-American perspective. It is a perspective, a point of view, and an understanding of racial reality that starts with the fundamental view of seeing black people as oppressed, not inferior. As a result, African Americans join in a collective struggle with one primary goal and objective—the liberation of African Americans from racial oppression.

²⁸ Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 114–15 (2003) [hereinafter Guinier, *Admissions*].

²⁹ DU BOIS, *supra* note 1, at 31.

³⁰ *Id.* at 36.

³¹ *Id.* at 37–42.

All men cannot go to college but some men must; every isolated group or nation must have its yeast, must have for the talented few centers of training where men are not so mystified and befuddled by the hard necessary toil of earning a living, as to have no aims higher than their bellies, and no God greater than Gold.³²

The rest of *The Talented Tenth* traces the graduation and professional achievements of blacks who attended white colleges between 1875 and 1899.³³ Du Bois places special emphasis on the social impact of these teachers, clergymen, physicians, and lawyers providing vision and knowledge to the rest of the black community.³⁴ For Du Bois, these educated few play a critical role. He stressed the fact that his Talented Tenth were intended to be educated for leadership and service in the struggle to uplift the African-American community.³⁵ Du Bois concludes, "The Talented Tenth of the Negro race *must* be made leaders of thought and missionaries of culture among their people."³⁶

Black recipients of affirmative action represent a significant portion of those who today compose the Talented Tenth. Consistent with Du Bois's vision of the Talented Tenth, black recipients of affirmative action have a special obligation to assist in the collective struggle to uplift the masses and thereby help to overcome this country's history of racial discrimination. While the Talented Tenth cannot overcome the legacy of racial oppression alone and must have the dedication and commitment of the larger American society, they are nevertheless central to that mission.

Beyond the personal efforts of the Talented Tenth to assist the masses, including their own family members and black friends, their

³² *Id.* at 37.

³³ *Id.* at 38–51.

³⁴ Years after Du Bois proposed the Talented Tenth solution, the concept was attacked and criticized as being elitist. Du Bois would later make clear that his Talented Tenth would not regard themselves as superior to the masses, but as part of the black community equipped for leadership for the benefit of the masses. There is some quantitative evidence that this has actually occurred. See Juan Battle & Earl Wright, II, *W.E.B. Du Bois's Talented Tenth: A Quantitative Assessment*, J. BLACK STUD. 654, 670 (2002).

³⁵ Du Bois eventually repudiated the concept he created in *The Talented Tenth*, criticizing them as accepting exploitation as defensible, making money, and spending it as they pleased, living in large, beautiful, expensive homes. W.E.B. DU BOIS, THE AUTOBIOGRAPHY OF W.E.B. DU BOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS FIRST CENTURY 239 (Henry Louis Gates, Jr. ed., Oxford University Press 2007) (1968). We wish to stay true to the notion of self-sacrifice for the benefit of the uplift of the masses of blacks in the United States that led Du Bois originally to propose the Talented Tenth solution.

³⁶ DU BOIS, *supra* note 1, at 50–51 (emphasis added).

accomplishments serve as examples of success that other blacks can look to as models for their own behaviors. These individuals tacitly deliver the message of hope that if they can be successful and overcome the barriers of race, then so can other blacks. Their personal success also helps to reduce the effects of racial oppression on the black community in the United States by creating another successful individual who has escaped the despair and the effects of poverty.

Though blacks in the United States have made enormous strides in the 100 plus years since *The Talented Tenth's* first publication, the black community as a whole remains significantly disadvantaged. For instance, since 1976 the National Urban League has issued a report providing the statistical measurement of the equality gaps between African Americans and whites in economics, education, health care, civic engagement, and social justice. The organization's 2007 report noted that in all categories except civic engagement, blacks lag behind whites.³⁷ In other words, if the focus is on improving the future of the black community in the United States, there remains much to do.

We reiterate the challenge first issued more than a century ago by W.E.B. Du Bois, insisting that the Talented Tenth, i.e. the beneficiaries of affirmative action, have a duty to assist in the collective struggle against the historical effects of racial subordination in the United States. We also assert that Ascendants are differently situated in regards to this historical struggle from Black/White Biracials and Black Immigrants. We write this having absolutely no wish to reduce the numbers of either Black/White Biracials or Black Immigrants on affirmative action programs. We emphasize that both Black/White Biracials and Black Immigrants also suffer from the racism that still pervades much of American society. Moreover, depending on individual predilections, non-Ascendant blacks can be instrumental in helping in the historical struggle against racial oppression in the United States. The election of Barack Obama³⁸ as President of the United States convincingly demonstrates the ability of Black/White Biracials and Black Immigrants to inspire Ascendants. Our primary concern with the current approach for the admission of blacks to selective higher education programs is the growing underrepresentation of Ascendants. As a result, admissions committees should consider the obstacles placed in their path of non-ascendant blacks

³⁷ NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA 2007: PORTRAIT OF THE BLACK MALE* 19, fig. 2 (2007).

³⁸ We use this vivid example despite the fact that under our system, Barack Obama would be an Ascendant. Obama's father was from Kenya and his mother was white, but since Obama was born in 1961, our definitions classify him as an Ascendant. BARACK OBAMA, *DREAMS FROM MY FATHER* (2004).

and their dedication to help in the historical struggle when determining their individual abilities during the admissions process.

C. Concern about the Underrepresentation of Ascendants on Affirmative Action Is Consistent with the Supreme Court's Opinion in Grutter

In the Supreme Court's most recent affirmative action pronouncement, *Grutter v. Bollinger*,³⁹ the Court addressed the University of Michigan Law School's admissions policy. This policy:

reaffirm[s] the Law School's longstanding commitment to one particular type of diversity, that is, racial and ethnic diversity with special reference to the inclusion of students from groups which have been *historically discriminated against, like African Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.* By enrolling a 'critical mass' of *underrepresented* minority students, the Law School seeks to ensure their ability to make unique contributions to the character of the Law School.⁴⁰

Justice O'Connor's opinion for five members of the Court in *Grutter*, affirmed Justice Powell's 1978 controlling opinion in *Regents of the University of California v. Bakke*⁴¹ regarding the constitutionality of the use of racial classifications in affirmative action plans. Like Powell, O'Connor noted that the use of racial classifications in the admissions process was only justified by the educational benefits derived from a diverse student body.⁴² In

³⁹ 539 U.S. 306 (2003).

⁴⁰ *Id.* at 316 (emphasis added) (internal citations omitted).

⁴¹ 438 U.S. 265 (1978).

⁴² *Grutter*, 539 U.S. at 327–30. Justice O'Connor noted additional benefits that flow from diverse student bodies that are not directly related to improvements in the academic environment. "Major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 308. Relying on the brief filed by high-ranking retired officers and civilian leaders of the military, Justice O'Connor also noted that their decades of experience revealed that a "highly qualified, racially diverse officer corps . . . is essential [for] the military[] . . . to fulfill its principle mission to provide national security." *Id.* at 331. At present, the military simply cannot achieve the twin goals of an officer corps that is both highly qualified and racially diverse without using limited race-conscious recruiting and admissions policies in the service academies and the ROTC. *Id.* Finally, Justice O'Connor noted that "universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders." *Id.* "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and

upholding the University of Michigan Law School's affirmative action plan, O'Connor specifically noted that the Law School's judgment that diversity is essential to its educational mission is one to which the Court would defer.⁴³ Thus, which individuals receive positive considerations during the admissions process is a matter of the considered judgment of administrators, admissions committees, and faculties at these institutions.

O'Connor emphasized that the benefits of enrolling a critical mass of underrepresented minority students with a history of discrimination are substantial:

[T]he Law School's admission policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races. These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.⁴⁴

Justice O'Connor goes on to note that the need for a critical mass is not premised on:

any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. . . . Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.⁴⁵

There can be little question that the constitutional justification for considering race and ethnicity in the admissions process stems primarily

qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity. . . ." *Id.* at 332.

⁴³ *Id.* at 328. Academic opinion is solidly behind the tremendous benefits of diversity for the education of all students. *See, e.g.*, Brief of the American Educational Research Association & Association of American Colleges and Universities, and the American Association for Higher Education as Amici Curiae in Support of Respondents at 4, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241). *See also* Lee C. Bollinger, *Why Diversity Matters*, CHRON. HIGHER EDUC., June 1, 2007, at B20 (Lee C. Bollinger, President of Columbia University, was previously president of the University of Michigan).

⁴⁴ *Grutter*, 539 U.S. at 330 (internal citations omitted).

⁴⁵ *Id.* at 333.

from the educational benefits derived from diversity. In *Grutter*, however, the Supreme Court approved an affirmative action program that "reaffirm[ed] the Law School's longstanding commitment to . . . racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against."⁴⁶ O'Connor indicated that this "policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races."⁴⁷ This policy also makes classroom discussions livelier, more spirited, and more enlightening.⁴⁸

We know of no one who contends that affirmative action in the United States is being used to target the oppression of groups who suffered from, say, French Colonialism in Algeria, exploitation of Koreans in Japan, or untouchability in India. Thus, the history of discrimination that matters for the purposes of American affirmative action plans logically must be a group's experience in the United States. It is being a member of the group that has suffered in this country that is the basis for O'Connor's statement that an individual's views will be affected by "one's own unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."⁴⁹ As a result, a particular focus on the concern of the underrepresentation of Ascendants by administrators, admissions committees, or faculties is at least consistent with—if not required by—O'Connor's opinion in *Grutter*. As is discussed in more detail in Part III, Ascendants are more likely to provide the benefits attached to the inclusion of underrepresented minorities with a history of discrimination than many non-Ascendant blacks.

II. THE INCREASING PERCENTAGE OF NON-ASCENDANT BLACKS ATTENDING COLLEGES, UNIVERSITIES, AND GRADUATE PROGRAMS INCLUDING SELECTIVE ONES

The African-American presence in colleges and universities prior to the current era was a small, select, and elite group of black men and women. For instance, in 1940 only 1.6% of blacks graduated from college; by 1960, the figure had risen to 5.4%.⁵⁰ The vast majority of these individuals matriculated at historically black colleges and universities, as very few

⁴⁶ *Id.* at 316 (internal citations omitted).

⁴⁷ *Id.* at 330.

⁴⁸ *Id.*

⁴⁹ *Id.* at 333.

⁵⁰ WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 2 (1998).

predominately white colleges and universities manifested a desire to enroll a significant number of blacks.⁵¹ This began to change in the 1960s, spurred in part by protests and universities' increasing interest in recruiting a more racially diverse student body.⁵² By 2000, the impediments to college admissions for blacks once created by law and custom were receding and the percentage of blacks over the age of twenty-five who graduated from college had risen to 16.5%.⁵³ Today, enrollment of blacks in selective colleges, universities, and graduate programs is largely mediated through affirmative action programs. A closer look at the racial and ethnic makeup of black students in higher education shows that Black/White Biracials and Black Immigrants constitute increasing percentages of blacks on college campuses, including selective higher educational programs. Thus, the percentage of Ascendants at many selective higher education institutions may be considerably less than many administrators and members of the faculty and admissions committee realize.

A. Increasing Percentages of Black/White Biracials in the United States and on College Campuses

Since the 1960s, acceptance of interracial marriages in the United States has increased. Surveys in the 1960s showed that about 92% of whites stated they would not consider marrying an African American.⁵⁴ As late as 1965, 48% of whites in a national poll indicated approval of criminal antimiscegenation laws.⁵⁵ In the South, the feeling was even stronger with 72% of whites approving of such laws.⁵⁶ By the late 1990s, tolerance for interracial marriage had increased significantly; a 1997 Gallup poll revealed that 77% of blacks and 61% of whites approved of interracial marriages.⁵⁷

⁵¹ *Id.* at 3–10.

⁵² *Id.*

⁵³ U.S. CENSUS BUREAU, EDUCATION ATTAINMENT OF THE POPULATION 25 YEARS AND OVER BY SEX, AND RACE AND HISPANIC ORIGIN (2000), *available at* <http://www.census.gov/population/socdemo/race/black/ppl-142/tab07.txt>

⁵⁴ ROBERT J. SICKELS, RACE, MARRIAGE, AND THE LAW 117 (1972).

⁵⁵ *Id.* at 42.

⁵⁶ *Id.* at 117.

⁵⁷ Maria P.P. Root, *The Color Of Love*, AM. PROSPECT, Apr. 8, 2002, at 54. Another survey of American attitudes showed that in 1997, 67% of whites and 83% of African Americans approved of interracial marriages. HOWARD SCHUMAN, CHARLOTTE STEEH, LAWRENCE BOBO & MARIA KRYSAN, RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 243–44 (1997).

However, in 1990, a National Opinion Research Center poll asked how certain groups would feel about a close relative marrying someone from outside their racial or

The increased social acceptance of interracial marriages has increased the number of biracial couples. In 1960, about 1.7% of married blacks had a white spouse.⁵⁸ In 1990, this percentage had risen to about 6%.⁵⁹ There is also evidence that interracial marriages increase as both black men and women obtain higher levels of education. According to 1990 statistics from the United States Census Bureau, 10% of black males with some college education and 13% of black males with some graduate school education who were married were in interracial marriages.⁶⁰ This contrasts with only 6% of high school dropouts and 7% of high school graduates.⁶¹ For black women, 4% of those with some college education, 5% of those who were college graduates and 6% of those with some graduate school education who were married were in interracial marriages.⁶² This contrasts with only 3% of those who were either high school dropouts or just high school graduates.⁶³ Interracial marriages also vary significantly across regions of the country. According to a 1997 article in the *Journal of Blacks in Higher Education*, 32% of blacks men in the Pacific Northwest, 30% in the Rocky Mountain states, 20% in California and 19% in New England states married outside of

ethnic group and 57.5% of blacks were strongly opposed. See also Walter C. Farrell, Jr. & James H. Johnson, Jr., *Minority Political Participation in the New Millennium: The New Demographics and the Voting Rights Act*, 79 N.C. L. REV. 1215, 1220 (2001) (citing Lawrence Bobo, Camille L. Zubrinsky, James H. Johnson, Jr., & Melvin L. Oliver, *Public Opinion Before and After the Spring of Discontent*, in THE LOS ANGELES RIOTS: LESSONS FOR THE URBAN FUTURE 117-24 (Mark Baldassare ed., 1995) (noting the prevalence of inter-group stereotyping with respect to intelligence and welfare dependence, among others)); Stephan Thernstrom & Abigail Thernstrom, *We Have Overcome*, NEW REPUBLIC, Oct. 13, 1997, at 27 (noting that the proportion of whites who would like to see interracial marriage outlawed has dropped from 62% to 16%). When examining preference patterns regarding intermarriage, responses are somewhat similar. Consistent with the previous findings, the strongest opposition is to intermarriage involving blacks. "Nearly one-third of White and Asian respondents and approximately 25% of Hispanics objected to an interracial marriage with an African American." Farrell & Johnson, *supra* note 57, at 1222; see also Isabel Wilkerson, *Black-White Marriages Rise, but Couples Still Face Scorn*, N.Y. TIMES, Dec. 2, 1991, at A1 (some polls suggest that as much as 20% of the white population continues to believe that interracial marriage should be illegal).

⁵⁸ Douglas J. Besharov & Timothy S. Sullivan, *One Flesh*, THE NEW DEMOCRAT, July-Aug. 1996, at 19, 21.

⁵⁹ *Id.* at 21.

⁶⁰ *The Effect of Higher Education on Interracial Marriage*, 16 J. BLACKS HIGHER EDUC., Summer 1997, at 55.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

their race.⁶⁴ The pattern of high rates of interracial marriage is not mirrored in the South where only one-third of whites will admit to even approving of interracial marriages.⁶⁵

Since 1990, the percentage of interracial marriages by blacks has continued to increase. In the 2000 Census, 9.7% of married black men and 4.1% of married black women reported having a spouse of another race.⁶⁶ A recent study comparing Census data from 1990 to that of 2000 of married couples between the ages of twenty and thirty-four suggest that these increases are continuing.⁶⁷ Native-born African Americans between the studied ages experienced increases in interracial marriages, as well as interracial cohabitation.⁶⁸ The 1990 and 2000 comparison of interracial marriages and interracial cohabitation arrangements are complicated by the fact that in the 1990 Census, individuals were only allowed to identify themselves in a single race category, but in the 2000 Census they were able to check all racial categories that applied.⁶⁹ Thus, in the 1990 Census, the native-born black category included those who in the 2000 Census self-identified as both single race blacks and multiracial blacks. Interracial marriages increased for both groups of blacks between 1990 and 2000.⁷⁰ The

⁶⁴ *Id.* at 56.

⁶⁵ See RENEE C. ROMANO, RACE MIXING: BLACK-WHITE MARRIAGE IN POSTWAR AMERICA 253 (2003).

⁶⁶ Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriages*, 60 POPULATION BULLETIN (Number 2) 1, 12 (2005), available at <http://www.prb.org/pdf05/60.2NewMarriages.pdf>. Despite the increase in interracial marriages involving blacks, they are still consistently rated as the least desirable spouses for children by Asians, Latinos, and Whites. See Vincent Kang Fu, *How Many Melting Pots? Intermarriage, Panethnicity, and the Black/Non-Black Divide in the United States*, 38 J. COMP. FAM. STUD. 218 (2007). For example, the percentage of single race American Indians in interracial marriages or cohabitations in 2000 was reported at 57.4% and 40.3% respectively, for Asian Americans 45.8% and 53.7% respectively, for Hispanics 31.9% and 38.9% respectively. For single race American Indian women, the percentage in interracial marriages or cohabitations in 2000 was 58.5% and 41.5% respectively, Asian Americans 59.6% and 66.3% respectively, and for Hispanics 30.7% and 36% respectively. Zhenchao Qian & Daniel T. Lichter, *Social Boundaries and Marital Assimilation: Interpreting Trends in Racial and Ethnic Intermarriage*, 72 AMER. SOC. REV. 68, 79 (2007).

⁶⁷ See Qian & Lichter, *supra* note 66, at 79.

⁶⁸ *Id.* While many individuals will get married, an alternative to marriage is cohabitation. Cohabitation is normally a short term marriage-like arrangement. It has contributed to a reduction in marriage rates in early adulthood and an increase in the average age of first marriage. The study also saw similar increases in the percentage of blacks involved in interracial cohabitation arrangements. *Id.*

⁶⁹ *Id.* at 89.

⁷⁰ *Id.* at 79.

percentage of native-born black men between the ages of twenty and thirty-four who had married outside of their race increased from the 1990 figure of 8.3% to 14.2% for single race black men, and if multiracial black men are included then the percentage goes to 15.4%.⁷¹ For native-born black women the increases were from the 1990 figure of 3.3% to 5.0% for single race black women and 6.0% if multiracial black women are included.⁷² With regard to co-habitation, the study found that the percentage of native-born black males went from 14.7% in 1990 to 21.9% in 2000 and for native-born black females from 5.6% to 6.2%.⁷³

The data demonstrating increasing interracial marriages and cohabitation strongly suggest that the percentage of Black/White Biracial students on college campuses is likely to continue to increase in the near future. There is further evidence from the 2000 Census that also suggests this increase is likely to continue. According to the 2000 Census, the median age of mixed race blacks is only 16.3⁷⁴ compared to black alone at 30.4 and the United States average of 35.4.⁷⁵ Where mixed-race blacks constitute 8.4% of blacks under the age of eighteen, they are only 3.7% of those between the ages of eighteen and sixty-four and only 2% of those ages sixty-five and older.⁷⁶

There is evidence of the overrepresentation of Black/White Biracials at selective colleges and universities.⁷⁷ However, finding nationwide statistics on the percentage of Black/White Biracials on college campuses is difficult, if not impossible. In part, this stems from difficulties identifying individuals of mixed race ancestry.⁷⁸ There is, however, data concerning educational attainment. While 14.3% of the black only population over the age of twenty-five had attained at least a bachelor's degree, 23.8% of Black/White Biracials have received at least a bachelor's degree.⁷⁹ This higher educational

⁷¹ *Id.* The percentage of native born African American men who identified as multiracial white who were in interracial marriages was 14.9% and the percentage of those who identified as multiracial minority who were in interracial marriages was 15.4%.

⁷² Qian & Lichter, *supra* note 66, at 79.

⁷³ *Id.* at 81.

⁷⁴ JESSE D. MCKINNON & CLAUDETTE E. BENNETT, *WE THE PEOPLE: BLACKS IN THE UNITED STATES, CENSUS 2000 SPECIAL REPORTS 17 tbl. 2* (2005), available at <http://www.census.gov/prod/2005pubs/censr-25.pdf>.

⁷⁵ *Id.* at 4, fig. 3.

⁷⁶ *Id.*

⁷⁷ See discussion on selective colleges and universities, *infra* Part II. C.

⁷⁸ See, e.g., Peter Schmidt, *Federal Panel May Spur Changes in the Way Colleges Track Enrollment by Race*, THE CHRON. OF HIGHER EDUC., July 18, 1997, at A27.

⁷⁹ See U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 4, PCT64 (2000), <http://www.census.gov/main/www/cen2000.html> (follow "Summary File 4" hyperlink,

attainment is unsurprising in light of Melissa Herman's findings that the test scores of black and multi-racial children who are raised in white homes are higher than those raised in black homes.⁸⁰

B. Increasing Percentages of Black Immigrants in the United States and on College Campuses

Immigration of blacks from different parts of the world has drastically changed the ethnic makeup of the black population on college and university campuses. This is a relatively recent phenomenon. In 1960, the percentage of foreign-born blacks in the United States was less than 1% of the black population, totaling just over 125,000 individuals.⁸¹ By 1990 that percentage increased to almost 5% and the numbers increased almost twelve fold to 1,455,294.⁸² According to the 2000 Census, there were almost 2,200,000 foreign-born blacks in the United States, constituting approximately 6.1% of the black population.⁸³ 41% of foreign-born blacks entered the United States

then select "Access to all tables and maps in American FactFinder," select "Detailed Tables," and enter "United States," "PCT64," and the desired ethnic groups); *see also* U.S. CENSUS BUREAU, SUMMARY FILE 4: 2000 CENSUS OF POPULATION AND HOUSING, TECHNICAL DOCUMENTATION 650-53 (2007), <http://www.census.gov/prod/cen2000/doc/sf4.pdf> (explaining that survey respondents are to check only one educational attainment box). For Black/Asians the percentage is 24.1%. *Id.*

⁸⁰ *See* Melissa R. Herman, The Black-White-Other Test Score Gap: Academic Achievement Among Mixed Race Adolescents (working paper, on file with the Institute for Policy Research, Northwestern University), available at <http://www.northwestern.edu/ipr/publications/workingpapers/wpabstracts02/wp0231.htm> 1 (last visited Nov. 19, 2008). Herman also found that Black/Asians do better in school than monoracial blacks, but not as well as Asians. Black/Asians are also less likely to self-identify as black than black/whites. Melissa Herman, *Forced to Choose: Some Determinants of Racial Identification in Multiracial Adolescents*, 75 CHILD DEV. 730, 736 tbl. 2 (2004), available at <http://www.dartmouth.edu/~socy/pdfs/MHftc.pdf>.

⁸¹ CAMPBELL GIBSON & EMILY LENNON, RACE AND HISPANIC ORIGIN OF THE POPULATION OF NATIVITY: 1850 TO 1990 (1999), available at <http://www.census.gov/population/www/documentation/twps0029/tab08.html>.

⁸² *Id.* This rise in immigration to the United States was triggered by the independence of Caribbean countries and the passage of the Immigration Act of 1965, which abolished the country-of-origin quotas, affirmed family connection preference, and increased the total numbers of immigrants to be admitted to the United States. Roger Waldinger, *Immigration and Urban Change*, 15 ANN. REV. OF SOC. 211, 212 (1989).

⁸³ JESSE D. MCKINNON & CLAUDETTE E. BENNETT, WE THE PEOPLE: BLACKS IN THE UNITED STATES, CENSUS 2000 SPECIAL REPORTS 7 fig. 5 (2005), available at <http://www.census.gov/prod/2005pubs/censr-25.pdf>. For figures related to the number of foreign born blacks, see also *id.* at 17 tbl. 2. In 2000, 84% of all foreign-born blacks were from two regions—the Caribbean (primarily Grenadines, Haiti, Jamaica, and Trinidad and Tobago) (60%) and Africa (primarily Ethiopia, Ghana, Nigeria and South Africa)

between 1990 and 2000, 32% entered between 1980 and 1989 and 28% before 1980.⁸⁴ The percentage of foreign born blacks has continued to grow since 2000. By 2005 the number of foreign born blacks increased to 2.8 million approaching almost 8% of the black population.⁸⁵ The increase in the African-born portion of foreign blacks is striking. Forty one percent of the foreign-born African immigrants came to the U.S. between 2000 and 2005.⁸⁶ By 2010 it is estimated that the population of foreign-born, first- and second-generation, Black Immigrants will reach 4.3 million (or 12%) of the black population.⁸⁷

According to United States Census Bureau statistics in 2004, 3.7% of the black children in K-12 schools were born outside of the country and 13.3% had at least one parent born in a foreign country.⁸⁸ Both of these percentages are approximately double the rate for whites.⁸⁹ The percentage of blacks who are foreign-born increases with higher levels of education. More than 12% of all black undergraduate students enrolled at United States colleges and universities were born outside of the United States.⁹⁰ This is over three times the rate for whites.⁹¹ In 2004, 20.9% of black undergraduates had at least one parent born outside of the United States.⁹² For enrolled black graduate students, 18.7%, almost one out of every five, were born outside the United States.⁹³ This compares with only 6.3% for white students.⁹⁴ In addition, 27.4% of the black graduate students had at least one foreign-born parent.⁹⁵

Making the case for the underrepresentation of African immigrants on college campuses is particularly difficult. The 2000 Census revealed that

(24%). *Id.* at 9 fig. 7. The 6.1% also contrasts with 11.1% of the total United States population being foreign born. *Id.* at 7 fig. 5.

⁸⁴ *Id.* at 8 fig. 6.

⁸⁵ MARY MEDERIOS KENT, IMMIGRATION AND AMERICA'S BLACK POPULATION 4 (2007), available at <http://www.prb.org/pdf07/62.4immigration.pdf>.

⁸⁶ *Id.* at 5.

⁸⁷ Xue Lan Rong & Frank Brown, *The Effects of Immigrant Generation and Ethnicity on Educational Attainment Among Young African and Caribbean Blacks in the United States*, 71 HARV. ED. REV. 536, 537 (2001), available at <http://www.edreview.org/harvard01/2001/fa01/f01rong.htm>.

⁸⁸ *A Solid Percentage of Black Students at U.S. Colleges and Universities Are Foreign Born*, 54 J. BLACKS HIGHER EDUC. 22 (Jan. 2006) [hereinafter *Solid Percentage*].

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Solid Percentage*, *supra* note 88.

⁹⁵ *Id.*

Black Immigrants from Africa averaged the highest percentage of college graduates of any group in the United States. The college graduation rate for African immigrants was 43.8%, compared to 42.5% of Asian Americans; 28.9% for immigrants from Europe, Russia, and Canada; and 23.1% of the United States population as a whole.⁹⁶ The African immigrants' average educational attainment level of 14 years also exceeds that of whites and Asians at 13.5 and 13.9, respectively.⁹⁷

On other economic measures, foreign-born black immigrants also fare better than native-born blacks do. The median household income of black immigrants exceeds that of native-born blacks. Africans have a median income of \$42,900 and blacks from the Caribbean have a median income of \$43,650.⁹⁸ This far outpaces that of native-born blacks, whose median income is \$33,790.⁹⁹ Foreign-born black immigrants are also less likely to be unemployed (7.3% and 8.7%, respectively, compared to 11.2%)¹⁰⁰ and live below the poverty level (22.1% and 18.8%, respectively, compared to 30.4%).¹⁰¹

C. The Underrepresentation of Ascendants in Selective Educational Programs

Since selective colleges, universities, and graduate programs are not in the practice of disaggregating their black applicants or students based on race and ethnicity, it is difficult to come by accurate statistics classifying black students into the categories suggested above. In addition, many administrators, admissions committees, and faculties may not be aware of the extent of the percentage of their black students that are non-Ascendants. Nevertheless, the decreasing percentage of Ascendants enrolled in selective higher education programs has drawn the attention of some scholars and researchers. In 2003, Harvard professors Dr. Henry Louis Gates, Jr. and Lani Guinier noted that the children of mixed-race couples and children of African and Caribbean immigrants together consisted of two-thirds of Harvard's

⁹⁶ Clarence Page, *Black Immigrants Collect Most Degrees But Affirmative Action is Losing Direction*, CHI. TRIB., Mar. 18, 2007, § 2, at 7.

⁹⁷ Abdi Kusow, *Africa: East*, in *THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965* 295, 299 (Mary C. Waters & Reed Ueda with Helen B. Marrow eds. 2007).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

black undergraduate population.¹⁰² A 2003 study of data collected from the National Longitudinal Survey of Freshmen revealed some startling information about black freshman enrolling in twenty-eight selective colleges and universities in 1999.¹⁰³ The survey results revealed that 17% of the black freshman reported themselves to be of mixed-race ancestry.¹⁰⁴

Studies of the behavior of the parents of biracial children suggest that it is unsurprising to find such children overrepresented in selective colleges and universities. For instance, one study of racial differences and parental practices with respect to education found that parents of biracial children

¹⁰² Ronald Roach, *Drawing Upon the Diaspora*, DIVERSE: ISSUES IN HIGHER EDUCATION, August 25, 2005, at 39, available at http://www.diverseeducation.com/artman/publish/article_4558.shtml.

¹⁰³ See generally DOUGLAS S. MASSEY, CAMILLE Z. CHARLES, GARVEY F. LUNDY, & MARY J. FISCHER, *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA'S SELECTIVE COLLEGES AND UNIVERSITIES* (2003). "The national longitudinal survey of Freshmen was developed to provide comprehensive data to test different theoretical explanations for minority underachievement in higher education Specifically, the NLSF sought to measure the academic and social progress of college students at regular intervals to capture emergent psychological processes hypothesized by investigators such as [Claude] Steele and [John] Ogbu." *Id.* at 20. The twenty-eight colleges and universities in the study were Barnard College, Bryn Mawr College, Columbia University, Denison University, Duke University, Emory University, Georgetown University, Howard University, Kenyon College, Miami University (Ohio), Northwestern University, Oberlin College, Pennsylvania State University, Princeton University, Rice University, Smith College, Stanford University, Swarthmore College, Tufts University, Tulane University, the University of California Berkeley, the University of Michigan, the University of North Carolina, the University of Notre Dame, the University of Pennsylvania, Washington University in St. Louis, Williams College, and Yale University. *Id.* at 30–31 tbl. 2.5. All of the twenty-eight schools are selective in the sense that only a subset of those who apply are selected. The least selective of the institutions was Miami University (Ohio) with a 79% acceptance rate, and the most selective was Princeton with an 11% acceptance rate. Douglas S. Massey, Margarita Mooney, Kimberly C. Torres, & Camille Z. Charles, *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 248 (2006) [hereinafter Massey, Mooney, Torres, & Charles, *Black Immigrants*] (focusing specifically on the issue of black immigrants in comparison to native born blacks).

The twenty-eight colleges and universities chosen for the survey are similar to the same institutions studied by William G. Bowen and Derek Bok. BOWEN & BOK, *supra* note 50, at 3. The difference is that Massey et al. included Georgetown University, Howard University, University of California at Berkeley and University of Notre Dame instead of Hamilton College, Vanderbilt University, Wellesley College, and Wesleyan University. See also *id.* at 292 tbl. A.1.

¹⁰⁴ MASSEY, CHARLES, LUNDY, & FISCHER, *supra* note 103, at 39.

allocate resources differently than monoracial parents.¹⁰⁵ This study, which compared more than 1,500 biracial families with monoracial families, revealed that, with one exception, biracial families provide resources that “typically exceed those offered by parents coming from one or both of the corresponding monoracial groups.”¹⁰⁶ In other words, there are significant advantages for biracial children in economic and cultural resources that may have the potential to translate into higher academic performance measures. The advantage, the researchers found, held true for the offspring of black/white couples in which the father was white and the mother was black.¹⁰⁷ Increased investment in educational attainment may well have paid off for the parents of biracial children.

A recent article discussing baseline data from the 2003 study of freshmen enrolling in the twenty-eight selective colleges and universities mentioned above focused heavily on the issue of black immigrants and native blacks.¹⁰⁸ This article noted that while only 13% of black eighteen- or nineteen-year-olds are first- or second-generation immigrants, they made up 27% of the freshmen at these selective colleges and universities.¹⁰⁹ The percentage of first- and second- generation black immigrants was actually higher at the ten most selective schools in the study, constituting 35.6%.¹¹⁰ Their percentage was even higher at the four Ivy League schools (Columbia, Princeton, Penn, and Yale) in the survey where they constituted 40.6% of the black students enrolled.¹¹¹ According to Dr. Michael T. Nettles, Vice President for Policy Evaluation and Research at the Educational Testing Service, “If Blacks are typically 5 and 6 percent of the population at elite colleges, then the representation of native U.S. born African Americans might be closer to 3

¹⁰⁵ Simon Cheng & Bryan Powell, *Under and Beyond Constraints: Resource Allocation to Young Children from Biracial Families*, 112 AMER. J. OF SOC. 1044, 1044 (2007).

¹⁰⁶ *Id.* at 1071.

¹⁰⁷ *Id.*

¹⁰⁸ Massey, Mooney, Torres, & Charles, *Black Immigrants*, *supra* note 103, at 243.

¹⁰⁹ *Id.* at 245. It has been apparent for some time that the emphasis on diversity in affirmative action programs, as opposed to social justice, works to the benefit of immigrants to the United States from Asia and Latin America. First- and second-generation Asians and Latinos constituted 97% and 73% of the freshmen of the Asian and Latino students, respectively at the twenty-eight institutions surveyed. However, these percentages more closely approximate the percentage of eighteen- and nineteen-year-olds who are also first- or second- generation immigrants for these groups: 91% and 66%, respectively. *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

percent.”¹¹² As Professor Guinier wrote in a *Boston Globe* column: “Like their wealthier white counterparts, many first- and second-generation immigrants of color test well because they retain a national identity free of America’s racial caste system and enjoy material and cultural advantages, including professional or well-educated parents.”¹¹³

III. SALIENT DIFFERENCES BETWEEN ASCENDANTS AND NON-ASCENDANTS IN THE HISTORICAL STRUGGLE AGAINST RACIAL SUBORDINATION IN THE UNITED STATES

It is important not to overstate differences between Ascendants and Black/White Biracials or Black Immigrants in the collective struggle to eradicate racial subordination in the United States. Individual predilections and experiences are always critical in determining a person’s social outlook, personality traits, and characteristics. The process of determining which individuals to admit to selective colleges, universities, and graduate programs is a process of determining whom to admit based upon how applicants can be distinguished from one another. To provide a simple example, if 98% of the knowledge and understanding among applicants is the same, then this 98% would be excluded for purposes of determining whom to admit and whom to deny. Only the differences among individuals matter. Thus, in determining admissions at the most selective higher education programs in our country, slight dissimilarities are conceptualized as significant differences. However, since the focus of this Article is the underrepresentation of Ascendants within affirmative action programs, it is critical that we address differences not among individuals, but among racial/ethnic groups of blacks in the United States.

A. *Black/White Biracials & the Emergence of a Distinct Identity*

Until the middle of the twentieth century, about thirty states banned interracial marriages of blacks with whites. However, with legal challenges to racial segregation in education, states began to abandon their antimiscegenation laws. Between 1952 and the Supreme Court’s 1967 decision in *Loving v. Virginia*,¹¹⁴ fourteen states repealed their

¹¹² Roach, *supra* note 102, at 40.

¹¹³ Lani Guinier, Op-Ed., *Our Preference for the Privileged*, THE BOSTON GLOBE, July 9, 2004, at A13.

¹¹⁴ 388 U.S. 1 (1967).

antimiscegenation statutes.¹¹⁵ Nevertheless, when the Supreme Court delivered its opinion in *Loving*, these statutes were still on the books in sixteen states.¹¹⁶

As a function of white supremacy, throughout most of the twentieth century, American society viewed mixed-race blacks as black. With the greater acceptance of interracial marriages and the increase in multiracial/biracial children, more and more mixed-race black individuals are asserting a multiracial identity. This section will briefly discuss the history of antimiscegenation statutes and the movement towards the creation of a biracial/multiracial identity among many mixed-race blacks.

1. *History of Antimiscegenation Statutes*

Remarking on the effect of overrepresentation of Black/White Biracials on affirmative action is a luxury that simply did not exist until now in the United States. To discuss differences between Black/White Biracials and Ascendants is a testament to the progress in weakening the strength of racism that has occurred in the United States over the past fifty years. Despite the fact that eradication of racial subordination is not complete, something undeniably positive has happened in American society for us to find a need to address this issue. We do not get to this point in the struggle against racial subordination without a slackening of the grip of racism.

Legal prohibitions against black/white marriage and sexual unions predate the Declaration of Independence. Antimiscegenation statutes, however, were not an American inheritance from the English common law, but legal developments by the colonies. The first such statute was passed by the Maryland General Assembly in 1661.¹¹⁷ Virginia adopted its first antimiscegenation statute a year later.¹¹⁸ From that point, penalties against miscegenation became common in the United States. At least thirty-eight states eventually enacted antimiscegenation statutes.¹¹⁹ Some states extended the prohibition against interracial marriage to cover whites who intermarried with Native Americans, Asiatic Indians, Chinese, Hindus, Japanese, Koreans,

¹¹⁵ The fourteen states were: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming. *Id.* at 6 n.5.

¹¹⁶ The sixteen states were Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.* at 6.

¹¹⁷ RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 19 (2001).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 17.

Malayans, and Mongolians.¹²⁰ All of the antiscegenation statutes, however, proscribed black/white sexual relations.

The abolition of slavery and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution after the Civil War created some question about the continued constitutionality of antiscegenation statutes. But these doubts were resolved by the Supreme Court in its 1883 decision in the case of *Pace v. Alabama*.¹²¹ In *Pace*, the Court sustained an Alabama antiscegenation statute against an equal protection challenge.¹²² For the next eighty-four years, all states, except California, used the *Pace* decision to sustain the constitutionality of their antiscegenation laws.¹²³

Although the Supreme Court struck down school segregation statutes in 1954,¹²⁴ it was not until 1967 that the Court invalidated antiscegenation statutes. In *Loving v. Virginia*,¹²⁵ the Court struck down Virginia's antiscegenation law, the Racial Integrity Act. One year after the Court's ruling in *Brown v. Board of Education*, the Virginia Supreme Court of Appeals upheld a challenge to the Racial Integrity Act.¹²⁶ The Act outlawed marriages by whites with anyone who had a single drop of nonwhite blood.¹²⁷ The Virginia law not only criminalized interracial marriage within the state, but also criminalized entering into such a marriage outside of the state with the intent of evading the statute's proscription.¹²⁸ The Virginia court unanimously stated that the purposes of the statute were to prevent the corruption of blood, a mongrel breed of citizens, the obliteration of racial pride, and to preserve the racial integrity of its citizens.¹²⁹

The case of Richard and Mildred Loving is illustrative of just how far the country has come in the last fifty years in terms of its acceptance of interracial marriages between blacks and whites. Richard (a white man) and Mildred (a black woman) crossed into the District of Columbia and were

¹²⁰ *Id.*

¹²¹ 106 U.S. 583, 585 (1883).

¹²² *Id.*

¹²³ See *Loving v. Commonwealth*, 147 S.E.2d 78, 80 (Va. 1966) (citing the California Supreme Court decision which declared the California miscegenation statutes unconstitutional in *Perez v. Lippold*, 198 P.2d 17, 47 (Cal. 1948)).

¹²⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹²⁵ 388 U.S. 1 (1967).

¹²⁶ *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955), *vacated*, 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849 (Va. 1956), *appeal dismissed*, 350 U.S. 985 (1956) (white woman sought and received an annulment of her marriage to a Chinese man because it violated the Racial Integrity Act).

¹²⁷ *Loving*, 388 U.S. at 5 n.4.

¹²⁸ *Id.* at 4.

¹²⁹ *Id.* at 7.

married pursuant to its laws.¹³⁰ Shortly thereafter, the Lovings returned to Virginia and established their marital abode in Caroline County.¹³¹ In the fall of 1958, a grand jury issued an indictment charging the Lovings with violating the Racial Integrity Act.¹³² On January 6, 1959, the Lovings pled guilty to the charge and were sentenced to one year in jail.¹³³ The trial judge, however, suspended the sentence for a period of twenty-five years on the condition that the Lovings leave the state and not return to Virginia together for twenty-five years.¹³⁴ To justify his decision, the trial court judge stated in his opinion:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.¹³⁵

After pleading guilty, the Lovings moved back to the District of Columbia.¹³⁶ Five years later, desiring to return to their homes in Virginia, they sought to have their convictions vacated on the ground that the statutes they were convicted under were repugnant to the Fourteenth Amendment.¹³⁷ The Virginia Supreme Court of Appeals once again upheld the constitutionality of the Racial Integrity Act.¹³⁸ However, the United States Supreme Court, in a unanimous opinion written by Chief Justice Earl Warren, stated that the clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious discrimination.¹³⁹ According to Warren, the Act was not justified by any purpose independent of invidious racial discrimination.¹⁴⁰ Warren went on to note that Virginia only prohibits interracial marriages involving white

¹³⁰ *Id.* at 2.

¹³¹ *Id.*

¹³² *Id.* at 2-3.

¹³³ *Loving*, 388 U.S. at 3.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Loving v. Commonwealth*, 147 S.E.2d 78, 83 (Va. 1966).

¹³⁹ *Loving*, 388 U.S. at 10.

¹⁴⁰ *Id.* at 11.

persons.¹⁴¹ This demonstrates that the racial classifications standing on their own justification are measures designed to maintain white supremacy.¹⁴²

2. *Emergence of a Post-Loving Distinct Biracial/Multiracial Identity*

Throughout much of the twentieth century, Black/White Biracials generally had the same legal, if not cultural, status as monoracial blacks.¹⁴³ There were, however, various categories on the census forms between 1850 and 1920 for mixed-race individuals, including mulatto, quadroon, and octoroon.¹⁴⁴ But, the instructions for the 1930 Census stated that the census form of “a person of mixed White and Negro blood was to be returned as Negro, no matter how small the percentage of Negro blood.”¹⁴⁵ This essentially made the “one-drop” rule a part of the compilation of Census statistics. In addition, over the centuries, many of the prominent leaders in the black community were biracial/multiracial individuals, including Crispus Attucks, Frederick Douglass, Prince Hall, Pickney Benton Stewart Pinchback, Robert Smalls, Bishop Henry McNeal Turner, Booker T. Washington, and, of course, Barack Obama.

Due to white supremacy, a white female could give birth to a black baby, but a black woman could not give birth to a white baby. As James Baldwin summed up this reality when talking to a white segregationist, “You’re not worried about me marrying *your* daughter. You’re worried about me marrying your *wife’s* daughter. I’ve been marrying your daughter ever since the days of slavery.”¹⁴⁶

Thomas F. Dixon, Jr., author of *The Clansman*, expressed the view about one drop of black blood accepted by mainstream American society. In his best-selling fictional novel *The Leopard’s Spots*, Dixon wrote, “One drop of Negro blood . . . kinks the hair, flattens the nose, thickens the lip, puts out the light of intellect, and lights the fires of brutal passions.”¹⁴⁷ Despite this belief,

¹⁴¹ *Id.* at 11 n.11.

¹⁴² *Id.* at 11.

¹⁴³ Mixed-race and biracial blacks often secured more privileges from whites during slavery era and from other blacks in the post-slavery period. See, e.g., AUDREY ELISA KERR, *THE PAPER BAG PRINCIPLE: CLASS, COLORISM, AND RUMOR AND THE CASE OF BLACK WASHINGTON, D.C.* (2006).

¹⁴⁴ RANDALL KENNEDY, *SELLOUT: THE POLITICS OF RACIAL BETRAYAL* 17 (2008).

¹⁴⁵ C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. SOC. 563, 568 (2003).

¹⁴⁶ Frank H. Wu, *The Multiracial Classification Can Be Detrimental*, in *INTERRACIAL AMERICA: OPPOSING VIEWPOINTS* 38 (Eleanor Stanford ed., 2006).

¹⁴⁷ THOMAS DIXON, JR., *THE LEOPARD’S SPOTS* 244 (1903) (mentioned in KENNEDY, *supra* note 144, at 13).

in Dixon's time, some individuals with black blood successfully passed as white. The peak years of "passing" were probably from 1880 to 1925.¹⁴⁸ Walter White, the Executive Secretary of the NAACP from 1931 to 1955, estimated that the numbers reached as high as 12,000 per year during peak years.¹⁴⁹ Others put the figure at no more than 2,000 per year.¹⁵⁰ Even though American society generally classified mixed-race black individuals as black, lighter-skinned blacks often received favorable treatment by whites and blacks.¹⁵¹

Because of centuries of miscegenation in the U.S., the majority of blacks have some white genes. Estimates are that between 75% and 90% of America's black population have some white genes.¹⁵² Experts place the overall white gene frequencies of American blacks at somewhere between one-fifth and one-fourth.¹⁵³ Northern blacks have the highest percentage of white genes. For example, the estimate for black population in Detroit is 25%, and 22% in Oakland, California. In comparison, it is only 4% in Charleston, South Carolina.¹⁵⁴

Increasingly, parents of biracial and multiracial individuals and these individuals are identifying in ways that reflect a desire to embrace their multiple racial heritages. Tiger Woods is a prominent example of a mixed-race black individual who openly considers himself "Biracial" or "Multiracial" as opposed to "black."¹⁵⁵ Wood's mother is of Thai, Chinese, and Dutch ancestry, and his father is a mixture of ancestries, namely African American, Chinese, and Native American.¹⁵⁶ Woods publicly refused the label of "black" and created the term "Cablinasian" to reflect his Caucasian, black, American Indian, and Asian ancestry.¹⁵⁷ As another multiracial person put it, "We multiracial people have the right to make an individual choice about our racial identity. Just because it, at the same time, may threaten many

¹⁴⁸ F. JAMES DAVIS, WHO IS BLACK? ONE NATION'S DEFINITION 56 (1991).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ KERR, *supra* note 143.

¹⁵² DAVIS, *supra* note 148, at 21. See also JON MICHAEL SPENCER, THE NEW COLORED PEOPLE: THE MIXED-RACE MOVEMENT IN AMERICA 156 (1997) (pointing to a study that estimated that about 70% of the black population of the United States has multiracial ancestry).

¹⁵³ DAVIS, *supra* note 148, at 21.

¹⁵⁴ *Id.*

¹⁵⁵ JOHN STREGE, TIGER: BIOGRAPHY OF TIGER WOODS (1st ed. 1997).

¹⁵⁶ Dewayne Wickham, *Tiger finally takes a public stand – the wrong one*, USA Today (May 16, 2000), available at <http://www.usatoday.com/news/opinion/columnists/wickham/wick095.htm>.

¹⁵⁷ *Id.*

blacks because of ongoing historical issues doesn't mean we should deny our white or other ancestries."¹⁵⁸

Groups like Project RACE (Reclassify All Children Equally) and the Association of MultiEthnic Americans spearheaded the effort to add a multiracial category to the 2000 Census.¹⁵⁹ Project RACE and the Association of MultiEthnic Americans premised their arguments on several grounds. They noted that since mixed-race individuals viewed themselves as multiracial rather than belonging to a single racial or ethnic group, such a designation was a better reflection of the true understanding of the multiracial/biracial person's racial identity. They also pointed to the inherent racism of the "one-drop rule," by which a person with any black blood is considered black.¹⁶⁰ These groups also noted the psychological problems created for biracial children who are forced to identify with one parent more than the other.

As Rainer Spencer noted, "[h]istorical oppression was and remains the primary logic behind the selection and maintenance of [the current] particular set of racial categories for tracking and monitoring."¹⁶¹ Nevertheless, the increasing identification of Black/White Biracials as "multiracial" may stem, at least in part, from a change in the collection of Census data.¹⁶² The first self-reporting Census did not occur until 1960. Before that, individual Census takers were hired to go out and conduct the counting and determine the characteristics of those they counted.¹⁶³ As a result, the old Census

¹⁵⁸ Eve Brown, *The Multiracial Classification is Necessary*, in *INTERRACIAL AMERICA: OPPOSING VIEWPOINTS* 34 (Eleanor Stanford ed. 2006).

¹⁵⁹ This effort was originally opposed by black civil rights leaders such as Jesse Jackson, Kweisi Mfume (representing the Congressional Black Caucus) and representatives of the NAACP. Civil rights groups were concerned that the addition of a multiracial category would increase the difficulty for collecting accurate data on the effects of discrimination and thereby undercut enforcement of discrimination laws. KERRY ANN ROCKQUEMORE & DAVID BRUNSMA, *BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA* 1-2 (2002) [hereinafter *ROCKQUEMORE & BRUNSMA, BEYOND BLACK*]. The American MultiEthnic Association was the product of an effort to provide a multiracial option on official forms including Census forms. For a comprehensive history of the movement, see Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1749-52 (2003).

¹⁶⁰ *ROCKQUEMORE & BRUNSMA, BEYOND BLACK*, *supra* note 158, at 1-17.

¹⁶¹ RAINER SPENCER, *SPURIOUS ISSUES: RACE AND MULTIRACIAL IDENTITY POLITICS IN THE UNITED STATES* 56 (1999) [hereinafter *SPENCER, SPURIOUS ISSUES*].

¹⁶² Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1808 (2000).

¹⁶³ See generally U.S. BUREAU OF THE CENSUS, *CENSUS OF POPULATION AND HOUSING: PROCEDURAL HISTORY* 6 (1960), available at <http://www2.census.gov/prod2/decennial/documents/1960/proceduralHistory/30335571.pdf>.

counting process catalogued socially ascribed identities. It provided information that allowed our society not to know individuals as they defined themselves, but to map out the effect of social practices, collective identification and the structure of racial hierarchies. But with individuals preparing their own Census forms, the concept of racial identity began to change for some individuals. By allowing individuals to mark the appropriate box, racial categorizations increasingly moved from socially ascribed identities to perceptions of how individuals viewed themselves.

In 1990, the Census bureau forms stated that individuals should check the one box that best described their race. Over 500,000 people, however, refused these instructions and selected more than one racial category.¹⁶⁴ While the 2000 Census did not provide a multiracial category for individuals to select, it did allow them to check more than one box when describing their race. The result was that 6.8 million Americans, or about 2.4% of the population, described themselves as multiracial.¹⁶⁵ Ninety-three percent of those who checked multiple racial/ethnic categories checked only two such boxes.¹⁶⁶ There were 784,764 reported black/white individuals. Another 706,525 individuals checked the black box and one other racial box (black and some other race 417,249; black and American Indian 182,494; black and Asian 106,782).¹⁶⁷ Thus, black/white individuals constituted 52.6% of blacks who checked black and one other racial box on the 2000 census.

Most admissions applications allow Black/White Biracials to identify as "black." This procedure, however, is increasingly in conflict with the racial identity of many biracial individuals. Research exploring the identity formation of biracial individuals suggests that they may understand their racial identity in a variety of ways. In addition to a singular identity (either exclusively black or exclusively white) which some research subjects chose, other options include a border identity (exclusively biracial), a protean identity (sometimes black, sometimes white, sometimes biracial) and a transcendent identity (no racial identity).¹⁶⁸ Research suggests that individuals also choose one (or several) identity(ies) based on social

¹⁶⁴ Wendy D. Roth, *The End of the One-Drop Rule? Labeling of Multiracial Children in Black Inter marriages*, 20 SOC. F. 35, 38 (2005).

¹⁶⁵ Jennifer Lee & Frank D. Bean, *America's Changing Color Lines: Immigration, Race/Ethnicity, and Multiracial Identification*, 30 ANN. REV. SOC. 221, 229 (2004).

¹⁶⁶ CENSUSSCOPE, UNITED STATES MULTIRACIAL PROFILE (2001), [http://www.censuscope.org/us/print_chart_multi.html](http://www.censusscope.org/us/print_chart_multi.html).

¹⁶⁷ *Id.*

¹⁶⁸ Kerry Anne Rockquemore & David L. Brunsma, *Socially Embedded Identities: Theories, Typologies, and Processes of Racial Identity among Black/White Biracials*, 43 SOC. Q. 335, 336 (2002).

networks or appearance.¹⁶⁹ Biracial students need not especially choose a single ethnic identity because they have several.¹⁷⁰

The ability to create a new racial identity as Tiger Woods chose to, and the fact that many Black/White Biracials may physically resemble Latinos, South Asians or Middle Easterners may encourage some Black/White Biracials to decide not to self-identify with Ascendants, a group of people who are still viewed negatively in our society.¹⁷¹ One study, not surprisingly, found that multiracial students at a predominately white university who were black and another race did not identify as strongly with being black as monoracial blacks.¹⁷² The study found that biracial black students were less likely to feel close to other black students and more likely to report extreme or considerable alienation from black students on campus. While 54% of monoracial black students reported that all or most of their close friends on campus were other black students, none of the biracial students did so.¹⁷³ Some 40% of the biracial black students described negative experiences with other blacks compared to only 12% of the monoracial black students.¹⁷⁴ A different study of 177 college students from Detroit who had one black and one white parent found that over 60% of these students developed what the study called a "border identity." They saw themselves as neither black nor white, but something of a hybrid.¹⁷⁵

¹⁶⁹ *Id.* at 338–40.

¹⁷⁰ For example, see David Kaufman, *Biracial Experiences in the United States*, *INTERRACE*, Apr. 1994, 15, 19 (quoting a Multiracial college student as saying that ethnic identity and cultural awareness are very important, but that a single ethnic identity is not necessary: "Who are you if you are not the sum total of your physical, mental and environmental beings?").

¹⁷¹ Like other blacks, some Black/White Biracials will often have their racial identity imposed upon them regardless of their individual predilections. For example, after Tiger Woods won the 1997 Master's Tournament, fellow golfer Fuzzy Zoeller referenced Tiger Woods serving "fried chicken or collard greens or whatever the hell they serve." Zoeller's comments are important because they reflect the reality that others may reject the self-identification labels used by biracial/multiracial blacks in favor of the "one-drop" rule and racist stereotypes. Glenn Sheeley, *Zoeller's remarks meet with disbelief; Veteran refers to Woods as 'little boy'*, *ATL. J. CONST.*, Apr. 21, 1997, at 2C.

¹⁷² Sandra S. Smith & Mignon R. Moore, *Intraracial Diversity and Relations among African-Americans: Closeness Among Black Students at a Predominately White University*, 106 *AM. J. SOC.* 1, 8 (2000).

¹⁷³ *Id.* at 25.

¹⁷⁴ *Id.* at 24.

¹⁷⁵ David L. Brunnsma & Kerry Ann Rockquemore, *What Does "Black" Mean? Exploring the Epistemological Stranglehold of Racial Categorization*, 28 *CRITICAL SOC.* 101, 108–09 (2002). It was not clear from the study if all the students had one black parent and one white parent or whether a few students had one black parent and one that was neither black nor white. The term "border identity" was proposed by Maria P. P.

B. Implications of the Overrepresentation of Black/White Biracials

From the perspective of the historical struggle against racial oppression in the United States, many Black/White Biracials may face divided loyalties regarding their relationship with Ascendants. Since at least one of their parents is white, they are likely to have more contact that is intimate with members of the majority community than the Ascendants. They will have families, relatives, and friends from their white side whose betterment for whom they are, and should be, concerned. As a result, they will funnel a greater portion of their energy, earnings and time away from the black community compared to that of Ascendants.

Many black/white biracial children, like many Ascendant children, grow up in single parent households.¹⁷⁶ Since the majority of black/white interracial marriages involve a black male and a white female, biracial children are much more likely to have a white mother and a black father.¹⁷⁷ Thus, if they grow up in a single parent household it is likely to be that of the white mother.¹⁷⁸ They are likely to receive a cultural orientation that

Root. Maria P. P. Root, *The Multiracial Experience: Racial Borders as a Significant Frontier in Race Relations*, in *THE MULTIRACIAL EXPERIENCE: RACIAL BORDERS AS THE NEW FRONTIER* xiii (Maria P. P. Root ed., 1996).

¹⁷⁶ "In 2005, 53% of black families with children under the age of 18 had a single parent compared to only 18.5% for white families in the same cohort." THOMAS D. SNYDER, SALLY A. DILLOW, & CHARLENE M. HOFFMAN, *DIGEST OF EDUCATION STATISTICS 2006*, 34 (2007), available at <http://nces.ed.gov/pubs2007/2007017.pdf>.

White numbers –

54,383,000 total white families in cohort

7,200,000 mom only – 13.2% of white families in cohort

2,888,000 dad only – 5.3% of white families in cohort

Total Percent single parent = 18.5 (13.2+5.3)

Black numbers –

8,904,000 total black families in cohort

3,991,000 mom only – 44.8%

734,000 dad only – 8.2%

Total Percent single parent = 53 (44.8 + 8.2)

¹⁷⁷ See Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Inter marriages*, 60 *POPULATION BULL.* (Number 2) 12–13 (2005), available at <http://www.prb.org/pdf05/60.2NewMarriages.pdf>.

¹⁷⁸ *Id.*

deemphasizes their connection to the historical struggle against racial oppression in the United States than Ascendants.¹⁷⁹ As a result, they could feel less attached to the historical struggle and may feel less obligated to participate in that struggle.

Successful Ascendants may be better role models for other Ascendant youth than Black/White Biracials. This in part could stem from the fact that some Black/White Biracials may appear to be Latino, South Asian or Middle Eastern. As a result, an Ascendant is more likely to inspire the other Ascendants to strive for academic success than many Black/White Biracials.

Mainstream American society may view some Black/White Biracials as a separate group from the Ascendants.¹⁸⁰ They may also seem more polite, less hostile, more solicitous and easier to get along with than Ascendants. The result is that successful Black/White Biracial may do less to combat negative stereotypes of Ascendants, and could possibly even reinforce those stereotypes.

Some Black/White Biracials may not effectively advance the diversity objectives outlined by the Supreme Court in *Grutter* to the same extent as Ascendants. Many Black/White Biracials are less willing to identify with the history of discrimination suffered by blacks in the United States. Many of them will not have experienced the effect of growing up as a racial minority to the same extent as Ascendants. As a result, this experience is less likely to have shaped the views of many Black/White Biracials as much as it has shaped the views of Ascendants. Thus, many Black/White Biracials are less likely than Ascendants to ensure the unique contributions to the character of education at a selective higher education program. As a result, some of the benefits of making classroom discussions more lively, spirited and more enlightening are lost. Ascendants are also more likely to contribute more to the benefits of cross-racial understanding that enables students to understand better persons of different races than many Black/White Biracials. These unique contributions were the reasons the University of Michigan Law

¹⁷⁹ Even if Black/White Biracials did have some sort of cultural orientation emphasizing their connection to the Ascendant community, they may not be the best role models for Ascendants. To choose two anecdotal examples, consider the contrasting lessons posed by Barack Obama and Tiger Woods. Obama has clearly inspired large groups of the black community. By contrast, it was believed that Tiger Woods would spark a significant increase in the interest of blacks in golf. Yet, Tiger proclaimed himself to be "Cablinasian." The anticipated increase in golf of black youth did not occur. Thus, Tiger's rejection of the label "black" may have reduced his ability to inspire black youth to embrace the game of golf by his example.

¹⁸⁰ See, e.g., Malcolm Gladwell, *Black Like Them*, NEW YORKER, Apr. 29, 1996, at 74, available at http://www.gladwell.com/1996/1996_04_29_a_black.htm.

School sought to enroll a critical mass of students from groups historically discriminated against.¹⁸¹

All of the reasons above suggest that, in general (but with recognition that there will certainly be important individual differences), the ability to attenuate the historical effects of racial oppression in the United States is more likely to be advanced with Ascendants obtaining positions of social advantage than it will be with many Black/White Biracials. In addition, Ascendants are more likely to advance the objectives of diversity in higher education than many Black/White Biracials. We do not ignore the fact that many blacks with a white parent such as Frederick Douglass, Barack Obama, and Halle Berry have been critical in the struggle against racial oppression in the United States and are very important leaders in the black community. As we stated before, our concern is not with the inclusion of Black/White Biracials in affirmative action programs, but the growing underrepresentation of Ascendants. Room in affirmative action should, of course, continue to exist for Black/White Biracials, but selective higher education programs need to also address the growing underrepresentation of Ascendants.

C. Distinguishing Black Immigrants' & Ascendants' Cultural Experiences

The primary differences between Ascendants and black immigrants relate to the different cultural influences to which they are exposed. For most nations of the world, national identity is the product of a long historical process.¹⁸² The United States' national identity, however, is based upon a commitment to a set of shared political ideals. As Margaret Thatcher once noted when discussing the United States, "[N]o other nation has so successfully combined people of different races and nations into a single culture."¹⁸³ The United States has done better than other countries at integrating into one society so many racial, ethnic, and religious groups that,

¹⁸¹ *Grutter*, 539 U.S. at 316 ("The policy adopted by the University of Michigan Law School reaffirmed the Law School's longstanding commitment to one particular type of diversity, that is, racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers. By enrolling a 'critical mass' of underrepresented minority students, the Law School seeks to ensure their ability to make unique contributions to the character of the Law School.").

¹⁸² SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 12 (1981).

¹⁸³ ARTHUR SCHLESINGER JR., *THE DISUNITING OF AMERICA* 78 (1991).

elsewhere in the world, have been enemies.¹⁸⁴ From the very beginning, the American identity was based on adherence to a set of political ideals that focus on liberty, democracy and individual rights.¹⁸⁵ Adherence to these ideals in the United States binds together individuals from disparate racial, ethnic and religious groups. Today any immigrant can embrace these ideals, regardless of their race, ethnicity, religion or color. Foreign-born black immigrants, like other immigrants, assimilate by adopting these shared political ideals.

While Ascendants do not literally constitute a nation,¹⁸⁶ their cultural identity is a product of a long historical process. The Ascendant experience in the United States, however, was not centered upon the American ideals. Rather it was the experience of historic deprivation and oppression based upon the immutable and involuntary characteristic of race. The greater part of the experience of the Ascendant community is of a group whose liberty, freedom and individual rights were sacrificed at the altar of the American ideals. As Malcolm X once remarked, "We didn't land on Plymouth

¹⁸⁴ Many commentators have noted that this American exceptionalism is due to the fact that a central feature of the American identity is the commitment to a set of principles, or, as Lincoln put it in the Gettysburg Address, Americans are "dedicated to [a] proposition." Abraham Lincoln, *Address at Gettysburg, Pennsylvania*, November 19, 1863, reprinted in *SELECTED SPEECHES & WRITINGS: ABRAHAM LINCOLN* 405 (Vintage 1992). The United States came into existence at a particular moment in time because of a deliberate and conscious political act based on explicit principles. As Jefferson wrote in the Declaration of Independence, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

¹⁸⁵ See, e.g., SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 23 (1981); ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 26 (1986); see also GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 19 (1944).

¹⁸⁶ Dr. C.J. Munford described the black nation: "It is different from other emergent nations only in that it consists of forcibly transplanted colonial subjects who have acquired cohesive identity in the course of centuries of struggle against enslavement, cultural alienation, and the spiritual cannibalism of white racism. This common history which the black people of America share is manifested in a concrete national culture with a peculiar 'spiritual complexion,' or psychological temperament. Though the black nation expresses its thoughts, emotions, and aspirations in the same tongue as American whites, the different conditions of existence . . . have, from generation to generation, welded the bonds of a national experience as different from that of white existence as day is from night. And what differentiates nations from one another are dissimilar conditions of life." James Turner, *Black Nationalism: The Inevitable Response*, *BLACK WORLD*, Jan. 1971, at 7-8 (quoting Dr. C. J. Munford, *Address at the Utah State University Symposium: Black National Revolution in America* (May 1970)).

Rock . . . Plymouth Rock landed on us.”¹⁸⁷ Thus, while recent foreign-born black immigrants are presented with the option of assimilating by adopting the American ideals, no such easy assimilation process was open to the Ascendants.

Nigerian born and American educated Professor Joseph Ogbu’s work in educational anthropology is particularly instructive on the differences created by the cultural influences of voluntary immigration as opposed to involuntary incorporation into a society. Ogbu studied the cultures and educational performances of minority groups throughout the world. According to Ogbu, two historical forces help shape the cultures of ethnic minority groups in their dominant host society: their initial terms of incorporation into society and their pattern of adaptive responses to discriminatory treatment by members of the dominant group after their incorporation. As a result, Ogbu separated minority groups into voluntary immigrants and involuntary minorities.¹⁸⁸

Voluntary immigration to a country with the purpose of searching for a better life provides an ethnic group with a reference point for understanding their economic, educational, political and social experiences in their host country. Voluntary immigrants generally move to their host country hoping for greater economic opportunities and more political freedom than were available at home. Therefore, they tend to compare their economic, educational, political and social situations in their host country to what they left behind. Generally, this comparison allows them to develop a positive comparative framework for interpreting their experiences and conditions in their host country. Many voluntary immigrants who do not believe they are better off in their host country, exercise the option of returning to their native land. Voluntary immigrants also come to America with their native culture intact. In the case of foreign-born black immigrants, this also means that they are much less likely to think of themselves in terms of their race than Ascendants.¹⁸⁹ The countries these immigrants typically hail from are places

¹⁸⁷ MALCOLM X, 1925–1965, THE AUTOBIOGRAPHY OF MALCOLM X 232 (Ballantine Books 1992).

¹⁸⁸ For the claim enumerated in this paragraph, see John U. Ogbu, *Immigrant and Involuntary Minorities in Comparative Perspective*, in MINORITY STATUS AND SCHOOLING: A COMPARATIVE STUDY OF IMMIGRANT AND INVOLUNTARY MINORITIES 37–61 (Margaret A. Gibson & John Ogbu eds., 1991).

¹⁸⁹ One noted expert on West Indian immigration stated that “Jamaicans have historically eschewed rigid, American-style racial dichotomies in which people are classified as either ‘black’ or ‘white,’ opting instead for a complex system in which a multiplicity of factors (e.g., ancestry, complexion, social standing, and education) determine ‘race.’ Consequently, on a day-to-day basis, Jamaicans hardly think about race—especially since all their role models (both social failures and the society’s leaders) are black.” Milton Vickerman, *Jamaica*, in THE NEW AMERICANS: A GUIDE TO

where black people constitute the overwhelming majority of the population. This would make a tremendous impact on racial consciousness. In addition, their reference points and sense of connectedness and belonging learned from when they were younger or from their parents would be derived from their country of origin.

The cultures of voluntary immigrants have not evolved in response to discrimination experienced in America. As a result, cultural and language differences between voluntary immigrants' native culture and the dominant American culture are not oppositional. Voluntary immigrants see the cultural differences between themselves and dominant group members as something they must overcome to achieve their goal of a better life. The goal of finding a better life, after all, is what brought them to their host country in the first place.

Both voluntary immigrants and involuntary minorities frequently face prejudice and discrimination in their host society and within educational institutions. Due to the historical meaning of blackness in American society, foreign-born blacks will encounter racial prejudice that white immigrants will not encounter. For example, the word "American" used to describe the United States is linked to domination, imperialism and racism. There are over 50 other countries in North and South America, including the Bahamas, Barbados, Jamaica, and Trinidad and Tobago. Yet, when United States citizens refer to America, their assumption is that they are referring to the United States alone.¹⁹⁰ Deep within the dominant cultural understanding of the United States is its historical association not only with a particular nation, but also with descendants of European ancestry.¹⁹¹ As one commentator who studied the experiences of immigrants to New York noted, "[B]ecause of their skin color—and because American society's generalized negative view of blacks is so different from racial conceptions in the home countries—[b]lack [i]mmigrants develop new attitudes and new perceptions of themselves in New York."¹⁹² Ogbu points out, however, that when confronted with discrimination, voluntary immigrants tend to interpret the

IMMIGRATION SINCE 1965, 485 (Mary C. Waters & Reed Ueda eds., with Helen B. Marrow, 2007).

¹⁹⁰ Elizabeth Martinez, *Don't Call This Country America: How the Name Was Hijacked and Why it Matters Today*, Z MAGAZINE, July–Aug. 2003, at 70 (2003).

¹⁹¹ TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 47 (1992). Melanie Bush, in a study of students at CUNY, noted that foreign-born white students were twice as likely to agree with the statement "I consider myself to be an American" than foreign-born black students (29.3% to 12.7%) and United States born whites were far more likely to agree with the statement than United States born blacks (83.8% to 58.1%). MELANIE BUSH, *BREAKING THE CODE OF GOOD INTENTIONS: EVERYDAY FORMS OF WHITENESS* 109, 112 (2004).

¹⁹² NANCY FONER, *NEW IMMIGRANTS IN NEW YORK* 14–15 (2001).

educational, economic, political, and social barriers they face as temporary. They believe they can overcome these problems in time, with hard work and more education. Voluntary immigrants may also view prejudice and discrimination as the price they must pay for the benefits they enjoy. Therefore, they have a greater degree of trust of, or at least acquiescence towards, members of the dominant group and the institutions they control.

This cultural story also influences the view voluntary immigrants have toward education. By viewing the obstacles they face as flowing from their lack of knowledge about their host country, voluntary immigrants make education an important element in the strategy of getting ahead. Opportunities for education in the United States also aid this positive educational comparison, as opportunities in the U.S. normally far exceed those available to foreign-born blacks in their native land.

The cultural perspective of voluntary immigrants contrasts starkly with the situation of involuntary minorities who were brought into their present society through slavery, conquest, or colonization. Without the voluntary aspect of their original incorporation, involuntary minorities differ from voluntary immigrants in their perceptions, interpretations, and responses to their situation. Unlike voluntary immigrants, involuntary minorities cannot refer to a native homeland to generate a positive comparative framework for their condition. Instead, they compare themselves to the dominant group. Since the dominant group is generally better off, this comparative approach often produces a negative interpretation of involuntary minorities' experiences and conditions. Involuntary minorities perceive themselves as victims of institutionalized discrimination perpetuated against them by dominant group members. As a result, involuntary minorities distrust members of the dominant group and the institutions they control.

Involuntary minorities respond to prejudice and discrimination differently than voluntary immigrants. Involuntary minorities do not have the luxury of being able to understand prejudice or discrimination as a consequence of their temporary status as foreigners. The prejudice and discrimination they experience in society and school relates to their history as members of a victimized group. Consequently, the experience of prejudice and discrimination is not part of a cost-benefit analysis. Rather, involuntary minorities are more likely to perceive discrimination as adding insult to injury.

Cultural differences between involuntary minorities and the dominant group may also arise after the former becomes an involuntary minority. In order to live with subordination, involuntary minorities develop coping mechanisms. These responses are often perceived as oppositional to those of

the dominant group.¹⁹³ The historical interactions of blacks and whites in this country have led to an oppositional character in the cultures of the two races.¹⁹⁴

Ogbu and others have found that these caste-like involuntary minority groups exist all over the world. Involuntary minority groups throughout the world exhibit similar patterns of adaption to their host society. Consider for example the following account by Claude Fischer and his colleagues in the sociology department at the University of California at Berkeley of a particular minority groups they studied:

Members of a minority, many of whom were brought to the country as slave labor, are at the bottom of the social ladder. They do the dirty work, when they have work. The rest of the society considers them violent and stupid and discriminates against them. Over the years, tension between minority and majority has occasionally broken out in deadly riots. In the past minority children were compelled to go to segregated schools and did poorly academically. Even now, minority children drop out of school relatively early and often get into trouble with the law. Schools with many minority children are seen as problem ridden, so majority parents sometimes move out of the school district or send their children to private schools. And as might be expected, the minority children do worse on standardized tests than majority children.¹⁹⁵

While this description may sound like it is describing African Americans in the United States, the authors are actually discussing the Korean minority in Japan. When the Japanese colonized Korea they brutally exploited its people, bringing some to Japan where they were relegated to the position of a disdained low group in Japan.¹⁹⁶ It is well known that there is an approximately 15-point IQ difference between blacks in the United States

¹⁹³ The oppositional nature in the United States worked both ways. Professor Karst noted that in the South, which is the American ancestral home for the overwhelming majority of African-Americans, to identify oneself as white meant, above all, to identify oneself as not black. KENNETH L. KARST, *BELONGING TO AMERICA* 17 (1989). See also Amuzie Chimezie, *Black Bi-Culturality*, 9 W. J. BLACK STUD. 224 (1985) (defining and discussing black bi-culturality).

¹⁹⁴ Due to the conflicts between the dominant American cultural heritage and perspective and Afrocentric cultural heritage and perspective, the two cultures cannot be integrated without some personality dislocation. ROBERT STAPLES, *INTRODUCTION TO BLACK SOCIOLOGY* 68 (1976).

¹⁹⁵ PAUL WACHTEL, *RACE IN THE MIND OF AMERICA: BREAKING THE VICIOUS CIRCLE BETWEEN BLACKS AND WHITES* 75 (1999).

¹⁹⁶ *Id.*; see also Claude Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AMERICAN PSYCHOLOGIST 613, 623 (1997).

and whites.¹⁹⁷ The same 15-point difference shows up in comparisons between a number of involuntary minorities in their host societies including the Maori of New Zealand, the Burakumin of Japan (a group that is racially indistinguishable from other Japanese but isolated as a disparaged group), the Dalits (also referred to as “outcastes” or “untouchables”) in India¹⁹⁸ and Oriental Jews in Israel.¹⁹⁹

In a society like the U.S., where race has negatively affected the cultural experience of blacks for centuries, it could be expected that the process of Americanizing recent foreign-born blacks would also be influenced by race. While the final stage of assimilation by white ethnics into American society is still debated, it has long been supposed in the models of identity and assimilation of white ethnics that higher social and economic status are attached to becoming more American.²⁰⁰ Yet, foreign-born black immigrants’ assimilation would imply becoming like native-born blacks, a group stigmatized and victimized by oppression in the United States for centuries. The consequence is that foreign-born black immigrants often find that retaining their ethnic identities is more beneficial than assimilating. Thus, for white ethnics who failed to progress economically, their ethnic identity was sort of a consolation prize. Maintaining ethnic identity of both first and second-generation black immigrants, however, functions differently. It becomes a source of economic and social advancement. Beyond the desire of foreign-born blacks not to be identified with Ascendants is the distinct possibility that they will also have negative experiences of rejection from Ascendants who may also see them as different.

In this Article, we define Black Immigrants to include foreign-born blacks as well as their sons and daughters. Second-generation black Immigrants born in the United States will differ somewhat from their parents, because they will experience much more of the impact of America’s cultural ideas about race and blacks than their parents. Yet, like Black/White Biracials, at least one of their parents—and hence at least half of their ancestry—is not a product of the struggle against racial oppression in the United States. In Mary Waters’s landmark study of West Indian immigrants,

¹⁹⁷ *Id.* at 623.

¹⁹⁸ For an informative comparative discussion of the higher educational opportunities of African-Americans in the United States and Dalits in India see Kevin Brown & Vinay Sitipati, *Lessons Learned From Comparing The Application Of Constitutional Law And Federal Anti-Discrimination Law To African-Americans In The U.S. And Dalits In India In The Context Of Higher Education*, 24 HARV. BLACKLETTER L. J. 3 (2008).

¹⁹⁹ WACHTEL, *supra* note 195.

²⁰⁰ MARY C. WATERS, BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES 328 (1999).

Waters argued middle class families and the institutions that supported them worked to maintain a distinct West Indian identity, with sharp cultural boundaries around their group.²⁰¹ Middle-class, second-generation West Indians assert their separate cultural identities from African Americans in order to claim the benefits of being a "model minority."²⁰²

Foreign-born black immigrants who socially and economically achieve more in American society are more likely to attempt to foster, assert, and maintain their separate ethnic identity. One study of blacks at selective colleges and universities confirms this inclination. It revealed that black immigrants were considerably less likely to self-identify as black or African American as opposed to native blacks.²⁰³ These results are also consistent with findings of Mary Waters in her study of the black identities of West Indian immigrants.²⁰⁴ Thus, while the socialization of second-generation blacks will differ from that of their parents, they are nevertheless going to be influenced by the parent's attitudes and beliefs about Ascendants.

Historically, as succeeding generations of black immigrants are born and socialized in the United States, the head start that the foreign-born blacks seem to possess as a result of their native culture not being a product of American history, appears to be lost by the third-generation.²⁰⁵ This evidence, however, must be taken in its historical context. As noted earlier, there were only 125,000 foreign-born blacks in the United States in 1960²⁰⁶ compared to 2.7 million in 2000.²⁰⁷ Thus, the current third-generation black immigrants did not benefit from the much larger numbers and percentages of foreign-born blacks in the United States today. The greater numbers and

²⁰¹ This is in contrast to "[w]orking-class and poor families [from the West Indies who] live in neighborhoods and work in institutions in which their children come to see little difference between themselves and African-Americans." *Id.* at 330.

²⁰² *Id.*

²⁰³ Massey, Mooney, Torres, & Charles, *Black Immigrants*, *supra* note 103, at 253. About 82% of black natives self-identified as "black, African American or Negro" compared to only 63% of first- and second-generation black immigrants. The immigrants were much more likely to use the "Other" category, 10% compared to 1.5%. A slightly larger percentage of immigrants identified themselves as mixed race, 19% compared to 16% of native blacks.

²⁰⁴ WATERS, *supra* note 200, at 289-92.

²⁰⁵ See Onwuachi-Willig, *supra* note 15, at 1196 (citing Xue Lan Rong & Frank Brown, *The Effects of Immigrant Generation and Ethnicity on Educational Attainment Among Young African and Caribbean Blacks in the United States*, 71 HARV. EDUC. REV. 536, 548-51 (2001)).

²⁰⁶ See *supra* note 13 and accompanying text.

²⁰⁷ JESSE D. MCKINNON & CLAUDETTE E. BENNETT, WE THE PEOPLE: BLACKS IN THE UNITED STATES, CENSUS 2000 SPECIAL REPORTS 7 fig. 5 (2005), available at <http://www.census.gov/prod/2005pubs/censr-25.pdf>.

percentages of black immigrants could impact the historical trends seen with respect to third-generation immigrants. For example, Jamaicans—the largest number of West Indian immigrants²⁰⁸—came to the United States in three distinct waves. Milton Vickerman, a University of Virginia sociologist and an expert on West Indian immigration, explained, “The first lasted until the 1920s . . . the second occurred in the 1940s and the 1950s; and the third was spurred by Jamaica’s achievement of independence in 1962.”²⁰⁹ The pressures for West Indians to integrate into the African-American community “are increasingly being challenged by a growing Jamaican immigrant population.”²¹⁰ At least for the purpose of this Article, the definition of Ascendants includes third-generation black immigrants. Whether we should expand our definition of black immigrants in another generation is beyond the scope of the immediate issue of the underrepresentation of Ascendants we seek to address.

D. Implications of the Overrepresentation of Black Immigrants

From the perspective of the historical struggle against racial oppression in the United States, many black immigrants may feel less attachment to, and thereby less obligation to be a part of, the historical struggle against racial oppression in the United States. As might be predicted, for many black immigrants, their major concern may first relate to relatives, friends, and other people in the countries that they left. This will mean that many black immigrants may be less committed to fighting racial oppression in the United States and, naturally, more concerned about assisting those they care about in their country of origin. There is ample proof of this concern on the part of Black Immigrants, especially those who are first-generation immigrants to the United States. One of the major sources of income for many developing

²⁰⁸ Vickerman, *Jamaica*, *supra* note 189 at 479. According to the 2000 Census, 59.6% of the 2,421,000 black immigrants are from the Caribbean. JESSE D. MCKINNON & CLAUDETTE E. BENNETT, WE THE PEOPLE: BLACKS IN THE UNITED STATES, CENSUS 2000 SPECIAL REPORTS 17 tbl. 2 (2005), available at <http://www.census.gov/prod/2005pubs/censr-25.pdf>. Jamaicans make up almost half of the West Indian immigrants in the United States. Vickerman, *Jamaica*, *supra* note 189 at 479.

²⁰⁹ Vickerman, *Jamaica*, *supra* note 189 at 479.

²¹⁰ *Id.* at 489–90. “Crucially, this growth is augmented by transnational processes that add ‘authenticity’ to Jamaican American culture by faithfully replicating the Jamaican way of life in the United States. This allows Jamaicans to feel increasingly comfortable in their culture even while living in a foreign land. Their cultivation of this culture to enhance upward mobility further strengthens it and sharpens divisions with non-West Indians.” *Id.*

nations in Africa is remittances from natives living abroad.²¹¹ In fact, many black immigrants may take their considerable talents that accrue to them as a result of affirmative action in the United States and head back to their native country.

Many foreign-born black immigrants also come to America for the very same reasons that other immigrants come to America. These reasons reflect a desire to improve one's social, economic or educational standing. As Mary Waters pointed out, "[t]hey wanted to make a better life for themselves, and they realized they could make more money in the United States than they could back home."²¹² As a result, they are not socialized with the same community building spirit for the African-American community in the U.S. that many Ascendant individuals will be indoctrinated with while growing up.

Ascendants who have been successful may also serve as better role models for their youth than some Black Immigrants. As a result, an Ascendant is more likely to inspire the other Ascendants to strive for academic success. In addition, mainstream American society may view Black Immigrants as a separate group from the Ascendants.²¹³ Black Immigrants may seem more polite, less hostile, more solicitous, and easier to get along with than Ascendants. The result is that successful Black Immigrants may do less to combat negative stereotypes of Ascendants, and could possibly even reinforce those stereotypes.

Some Black Immigrants may not effectively advance the diversity objectives outlined by the Supreme Court in *Grutter* to the same extent as Ascendants. Many Black Immigrants may be less willing to identify with the history of discrimination suffered by blacks in the United States. As Ogbu argues, many of them may attribute the discrimination that they experience as stemming from their status as an immigrant, rather than to their race.²¹⁴ Many Black Immigrants will not have experienced the effect of growing up as a racial minority in the United States to the same extent as Ascendants. As a result, this experience is less likely to have shaped the views of some Black Immigrants as much as it has shaped the views of Ascendants. Thus, many Black Immigrants are less likely than Ascendants to ensure the unique contributions to the character of education at a selective higher education program sought by these institutions when they seek to enroll a critical mass of students from groups historically discriminated against in the United States. Some of the benefit of making classroom discussions more lively,

²¹¹ See generally Devesh Kapur & John McHale, *Globalization at Work: Migration's New Payoff*, 139 FOREIGN POL'Y 48 (2003).

²¹² WATERS, *supra* note 200, at 331.

²¹³ See, e.g., Gladwell, *supra* note 180.

²¹⁴ Ogbu, *supra* note 188, at 11.

spirited, and more enlightening are lost. Ascendants are also likely to contribute more to the benefits of cross-racial understanding that enables students to understand better persons of different races than many black immigrants.

All of the reasons above suggest that, in general (but with recognition that there will certainly be important individual differences), the ability to attenuate the historical effects of racial oppression in the United States is more likely to be advanced with Ascendants obtaining positions of social advantage than it will be with a Black Immigrant. In addition, Ascendants are more likely to advance the objectives of diversity in higher education than many Black Immigrants. We do not ignore the fact that many foreign-born blacks and their children like Marcus Garvey, Colin Powell, Shirley Chisholm and Malcolm X have been critical in the struggle against racial oppression in the United States and very important leaders in the black community. As we stated before, our concern is not with the inclusion of Black Immigrants on affirmative action programs, but the growing underrepresentation of Ascendants. Room in affirmative action should and must be maintained for Black Immigrants, but the growing underrepresentation of Ascendants must be reversed.

IV. THE SOLUTION: CREATION OF A NEW TALENTED TENTH

In this section, we propose a solution directed to administrators, admission committees, and faculties of selective higher education programs to address the growing underrepresentation of Ascendants on affirmative action. Our solution is much more in line with O'Connor's opinion in *Grutter* than the current practice of not distinguishing Ascendants from Black/White Biracials or Black Immigrants. The admissions policy of the University of Michigan Law School, approved by the Supreme Court, made special reference to "the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."²¹⁵ Neither Black/White Biracials nor Black Immigrants can make as forceful a claim about being from groups victimized by historical discrimination in the United States as Ascendants. Unlike Ascendants, there is evidence pointing to the distinct possibility that both Black/White Biracials and Black Immigrants are not underrepresented at many selective higher educational institutions.²¹⁶ Our solution for the underrepresentation of Ascendants enrolled in selective colleges, universities, and graduate programs is to breathe new life into affirmative action by

²¹⁵ *Grutter*, 539 U.S. at 316.

²¹⁶ See *supra* Part II.

emphasizing the importance of the concept of the Talented Tenth and the connection that individuals have with the history of discrimination of black people in the United States.

A. *The Current System*

Currently, the vast majority of college applicants complete either a form called the Common Application or the Universal College Application. For admissions decisions for the 2009/10 academic year, almost 350 public and private colleges accept the Common Application²¹⁷ and almost 80 institutions accept the Universal College Application form.²¹⁸ Both of these forms provide comparatively less information about the racial/ethnic ancestry of blacks in contrast to Asian Americans, Asians, Hispanic/Latinos, and Native Americans. Both applications consist of a set of standard questions asking for personal and academic information. With respect to race/ethnicity, there are several categories from which to choose:

- ☐ African American, African, Black
- ☐ Asian American (country of family's origin _____)
- ☐ Asian, including Indian Subcontinent (country _____)
- ☐ Hispanic, Latino (country _____)
- ☐ Mexican American, Chicano
- ☐ Native American, Alaska Native (enrolled _____)
Tribal affiliation (_____)
- ☐ Native Hawaiian, Pacific Islander
- ☐ Puerto Rican
- ☐ White or Caucasian

²¹⁷ For a list of the 346 institutions that accept the common application see Common Application—List of Members (2008), available at <http://www.commonapp.org/CommonApp/Members.aspx>.

²¹⁸ For a list of these institutions see the Universal College Application- Universal College Application—College Membership, available at <http://www.universalcollegeapp.com/index.cfm?ACT=Display&APP=APPONLINE&DSP=CollegeMembership> (last visited Nov. 19, 2008).

☐ Other (specify _____)²¹⁹

Deconstructing the current approach makes it clear that college and university admissions committees garner surprisingly little information with respect to race/ethnicity from those who check the “black” box. Asian-Americans, Asians, and Hispanics/Latinos are asked to supply their country of origin. Native Americans are asked their tribal affiliation and when they enrolled as tribal members. While it might be easy to identify the applicants who wish for the admissions committee to know that they are Filipino, for instance, this is not the case for Ascendants. The presence of Ascendants in the current system is not immediately obvious. Those “eligible” to indicate on the application that their race/ethnicity is in the “African-American/African/black” category include Ascendants as well as Black/White Biracials and Black Immigrants.

B. *A New System with More Information*

The solution we suggest creates additional steps in the application review process. The current system of affirmative action as applied to black applicants is predicated solely on the applicant identifying him or herself as having some unspecified amount of African blood.²²⁰ Instead of combining all blacks together, Ascendants should be separated from Black/White Biracial and Black Immigrant applicants.

²¹⁹ The Common Application for Undergraduate College Admission (2008), available at <https://www.commonapp.org/CommonApp/docs/downloadforms/CommonApp2008.pdf> and Universal College Application (2008), available at https://www.universalcollegeapp.com/Library/PrintPreview/Universal_College_Application.pdf. Under the Common Application this information is not mandated. Applicants are informed that the information supplied in this category is optional and that information that is provided will not be used in a discriminatory manner. Interestingly enough, the Universal College Application makes ethnicity the only information on the form that is optional.

²²⁰ With respect to ethnicity, there are several categories from which to choose. One category is “African American, African, Black” and another is “Other (specify _____).” The Common Application for Undergraduate College Admission (2008), available at <https://www.commonapp.org/CommonApp/docs/downloadforms/CommonApp2008.pdf>.

This is not mandated, as applicants are informed that the information supplied in this category is optional and that information that is provided will not be used in a discriminatory manner. Interestingly enough, the less widely used competitor to the Common Application, the Universal College Application—used by Harvard and several other elite schools—makes ethnicity the only information on the form that is optional. Universal College Application (2008), available at https://www.universalcollegeapp.com/Library/PrintPreview/Universal_College_Application.pdf.

We propose a new system that is much more tailored to identifying and giving priority to Ascendants, the group, in large part, that affirmative action was created to benefit. The form we suggest lists five subcategories for blacks. On the new form is a box that says "African descent." Anyone who checked this box would then be asked to write a separate optional supplemental statement that discusses how they either 1) experienced past discrimination based on skin color in the United States; or 2) identify with the historical struggle to eradicate racial oppression in the United States. They would also be required to check one of five additional boxes. The form would have a box labeled "African Ancestry." The directions would inform individuals with one or both parents born in Africa to check this box.²²¹ The form would ask these students to specify their parent's(s') country (or countries) of origin. The second box would resemble the first, except that it is labeled "Caribbean Ancestry." It would also require individuals to specify the country or countries of origin of their Caribbean parent or parents. A third box would exist for individuals with one or both parents born outside of the United States who are of African descent, but not immigrants from Africa or the Caribbean (e.g. a black immigrant whose mother and/or father was from Brazil or France) with the same requirement to specify country of origin of their parent(s). A fourth box would exist for applicants who are biracial or multiracial.²²² The form would direct these students to specify the ancestry of their non-black mother and/or father. Ascendants would check a fifth box labeled "Native-born Blacks."

In addition to allowing a college, university, or graduate program to gain a better sense of the race and ethnicities of all of its applicants of African descent, the following system has the advantage of allowing a college to easily identify the Ascendants who are part of the application pool.

The new question might look something like this:

☐ African descent (please specify below)

²²¹ Under our definition of Ascendants, any person with foreign-born parents who entered the United States before 1968—and hence at least forty years old in the Fall of 2009—would be considered an Ascendant. Rather than add this into the instructions for designating racial/ethnic ancestry, we think it would be easier for admissions committees to note the few individuals who are at least forty years old in this category and provide them with the additional positive considerations we suggest.

²²² Under our definition of Ascendants, any person with any black blood born before 1967—and hence at least forty-one years old in the Fall of 2009—would be considered an Ascendant. Rather than add this into the instructions for designating racial/ethnic ancestry, we think it would be easier for admissions committees to note the few individuals in this category who are at least forty-one years old and provide them with the additional positive considerations we suggest.

☐ African Ancestry (specify country of birth of Mother and/or Father not born in the U.S. _____)

☐ Caribbean Ancestry (specify country of birth of Mother and/or Father not born in the U.S. _____)

☐ Other non-U.S. Ancestry (specify country of birth of Mother and/or Father not born in the U.S. _____)

☐ Black Biracial/Multiracial (specify ancestry of non-Black mother and/or father _____)

☐ Native-born Blacks²²³

The prior undifferentiated “African-American, African, Black” box is replaced by this new system with five new applicant pools. As we argued above, separating out these groups makes sense both for purposes of advancing the reasons articulated by the Supreme Court in *Grutter* that justifies the use of racial classifications in the admissions process and for the social justice interest discussed earlier. A more differentiated system also places Black Immigrant applicants on par with applicants of other ethnic backgrounds when admissions forms ask for more information regarding ethnic roots.

Once applicants of African descent have been broken into these cohesive and distinct groupings, the questions become how admissions committees allocate positive considerations in the affirmative action process. One radical approach would argue that only Ascendants should receive race and ethnic based privileges associated with affirmative action. We do not favor such a harsh approach. Our concern is about the underrepresentation of Ascendants on affirmative action programs, not with the inclusion of non-Ascendant blacks. By collecting data on the racial ancestries of black students, each selective higher education program can determine whether Ascendants are underrepresented and the degree of that underrepresentation.

²²³ Under the definition of Ascendants any individual with a significant amount of black ancestry born before the June 12, 1967 is considered an Ascendant. Even though these individuals may check the “Black Biracial/Multiracial” box, selective colleges, universities, and graduate programs can identify these individuals by looking at their date of birth. Ascendants also includes those foreign-born blacks who entered the United States before July 1, 1968. These individuals would have to be at least forty years old. However, since it is not their age, but when they entered the United States, that determines whether they are Ascendants, higher educational programs may have some difficulty identifying these individuals from the revised application form. However, the numbers should be very small.

If a given higher educational institution determines that Ascendants are underrepresented, then it should give additional positive considerations to Ascendants as part of their holistic evaluation. Due to the ancestral connection of Ascendants to the historical struggle against racial oppression, they should receive positive considerations because they are descendants from people who have suffered from a history of discrimination in the United States. As with any holistic evaluation of a particular candidate, we do not attempt to quantify the amount of positive considerations—that must be determined by each individual admissions committee as they grapple with this issue.

Admissions committees should also give additional positive considerations to anyone who checked the “African descent” box based upon their supplemental statements indicating that they have either 1) experienced past discrimination based on skin color in the United States, or 2) identify with the historical struggle to eradicate racial oppression in the United States. If either of these factors appears to be present in an individual applicant’s response, he or she has made a case for receiving additional positive considerations in the admissions process. Ascendants who indicate this on their supplemental statement would be eligible for what would amount to double positive considerations: one amount based on their racial ancestry and a second based on their supplemental statement.

There are a number of potential administrative obstacles with this approach. Most of the administrative difficulties are issues that are generally associated with college admissions. First is the problem of redrafting admissions documents to allow for the ability to focus on these additional aspects of a particular black applicant. This is no small obstacle. It would also entail changing both the Common Application and the Universal College Application forms that are used by almost 430 college and university undergraduate admissions offices.

Second, colleges and universities are subject to certain state and federal reporting requirements regarding the race/ethnicity of their student bodies.²²⁴ Breaking down black applicants will require that they also reconstruct those categories in order to meet those reporting requirements.

Beyond these, there is the problem that particular applicants will lie when filling out the application. Applicants might lie or manufacture stories representing themselves as victims of discrimination or they may overstate their sense of identification with those impacted by the history of discrimination suffered by blacks in the United States. However, currently, applicants say nothing about their blackness, save checking a box. As Lani Guinier has pointed out, “[s]ome students’ decisions to ‘check the boxes’ in

²²⁴ For a discussion of history of federal racial categorization which are needed to satisfy civil rights compliance monitoring see SPENCER, *supra* note 161, at 59–82.

order to gain admission under affirmative action is purely instrumental in that a small but growing number of these beneficiaries privately express disdain for the group with which they have temporarily identified."²²⁵ At least under the system described above, they will have to designate their ethnicity and could be sanctioned for misrepresentation under the general prohibition against falsifying their application. They must also write a separate personal statement. These additional burdens could function as a disincentive for those who otherwise just have to check a box in order to receive positive considerations based on black ancestry. There is also the issue of increased paperwork, judging problems, time, and effort for the admissions committee members. We acknowledge that our proposal will consume additional time, but we think that the benefits far outweigh the costs.

CONCLUSION

Selective colleges, universities, and graduate programs first created affirmative action admissions policies in the late 1960s and early 1970s. There can be little question that the primary anticipated beneficiaries of these programs were blacks who were descendants of those brought to the United States in chains. At the time of the adoption of affirmative action plans, the racial and ethnic makeup of blacks in the United States was very different. The overwhelming majority of married blacks were married to other blacks. In 1960, only about 1.7% of married blacks had a white spouse.²²⁶ In addition, in 1960, less than 1% of the black population was foreign-born, totaling just 125,000 individual.²²⁷ As a result, a very small percentage of college-age blacks—and thus potential beneficiaries of these admission plans—had a foreign-born black parent. Due to the historical impact of racism on American society, the "one drop rule" classified any person with some African ancestry as black. Because of these realities, the general rule in American society about racial and ethnic ancestry of the overwhelming majority of college-age blacks—and thus potential beneficiaries of affirmative action—was that they were descendants of blacks originally brought to the United States as chattel slaves. This was a fundamental assumption upon which affirmative action was developed.

Supporters and critics of the Supreme Court's decision in *Grutter* must have envisioned the maintenance of an established presence of those whose racial and ethnic ancestry was deemed as predominantly traceable to the

²²⁵ Guinier, *Admissions*, *supra* note 28, at 155 n.166. Others Black/White Biracials or black immigrants may check the "African-American" box because they feel that there is no other option for them.

²²⁶ Besharov & Sullivan, *supra* note 58, at 19.

²²⁷ See *supra* note 13 and accompanying text.

historic oppression of blacks in the United States—at least for the next twenty-five years. Yet, selective college, university, and graduate programs are admitting increasing numbers of Black/White Biracials and Black Immigrants. In light of this dynamic, we are witnessing a historic change in the general rule regarding the racial and ethnic ancestry of blacks on affirmative action throughout the country. There is increasing evidence that the underrepresentation of Ascendants admitted to selective colleges, universities, and graduate programs is far greater than administrators, admissions committees, or faculties realize.

In this Article, we questioned the lumping of all blacks into a single category approach that pervades admissions decisions of so many selective colleges, universities, and graduate programs in order to call attention to the growing underrepresentation of Ascendants on affirmative action. In order to draw distinctions among blacks for purposes of admissions to selective higher education programs, there must be an overarching vision of the goals of affirmative action—at least as it applies to the black community in the United States. We approached affirmative action from the perspective of the historical struggle undertaken by the black community to overcome its racial oppression in the United States. Affirmative action would be a part of the strategy for the uplift of the black community in the United States. W.E.B. Du Bois, the legendary African-American social commentator, articulated this concept over a hundred years ago in his famous article, *The Talented Tenth*.²²⁸ Du Bois's view squarely places part of the responsibility for black empowerment gained through college and university attendance on the shoulders of the Talented Tenth—well-educated, distinguished men and women crusaders dedicated to alleviating the burdens of blackness and the color line.²²⁹ According to Du Bois, the Talented Tenth was obligated to sacrifice their personal interests in an effort to provide leadership to improve the social, economic, and political condition of the black community.²³⁰ We also proposed a solution for administrators, admissions committees and faculties of selective colleges, universities, and graduate programs to address the growing underrepresentation of Ascendants.

As authors, we are mindful of the long and odious history in the United States of classifications based on ancestry. We are cognizant of the fact that discussions about the underrepresentation in affirmative action programs of particular blacks as determined by their parentage within the "black" category cannot help but dredge up negative feelings from this infamous past. Beyond generating negative feelings, the phenomenon we are describing is counter-historical. Historically, the African-American

²²⁸ DU BOIS, *supra* note 1, at 36.

²²⁹ *Id.* at 33, 37.

²³⁰ *Id.* at 50–51.

experience is the treatment of black individuals as members of one race. This treatment produced a cultural orientation for blacks in the United States centered on the fundamental belief in a unified black population. A discussion about the parentage of blacks for purposes of affirmative action requires the recognition and open discussion of the existence of various "black" racial and ethnic groups. As a result, such a discussion calls into question black unity, which is the historical core belief of the black community. Nevertheless, we proceed, mindful of the reality that not discussing the growing percentage of Black/White Biracials and black immigrants among blacks on affirmative action is a choice. Ascendants are far more underrepresented than many administrators, admissions committees and faculties realize. As a result, they are far less likely to qualify for the positions of social advantage in the future awarded to those who obtain selective academic credentials based on them. In this situation, our silence would constitute our assent to these developments.

